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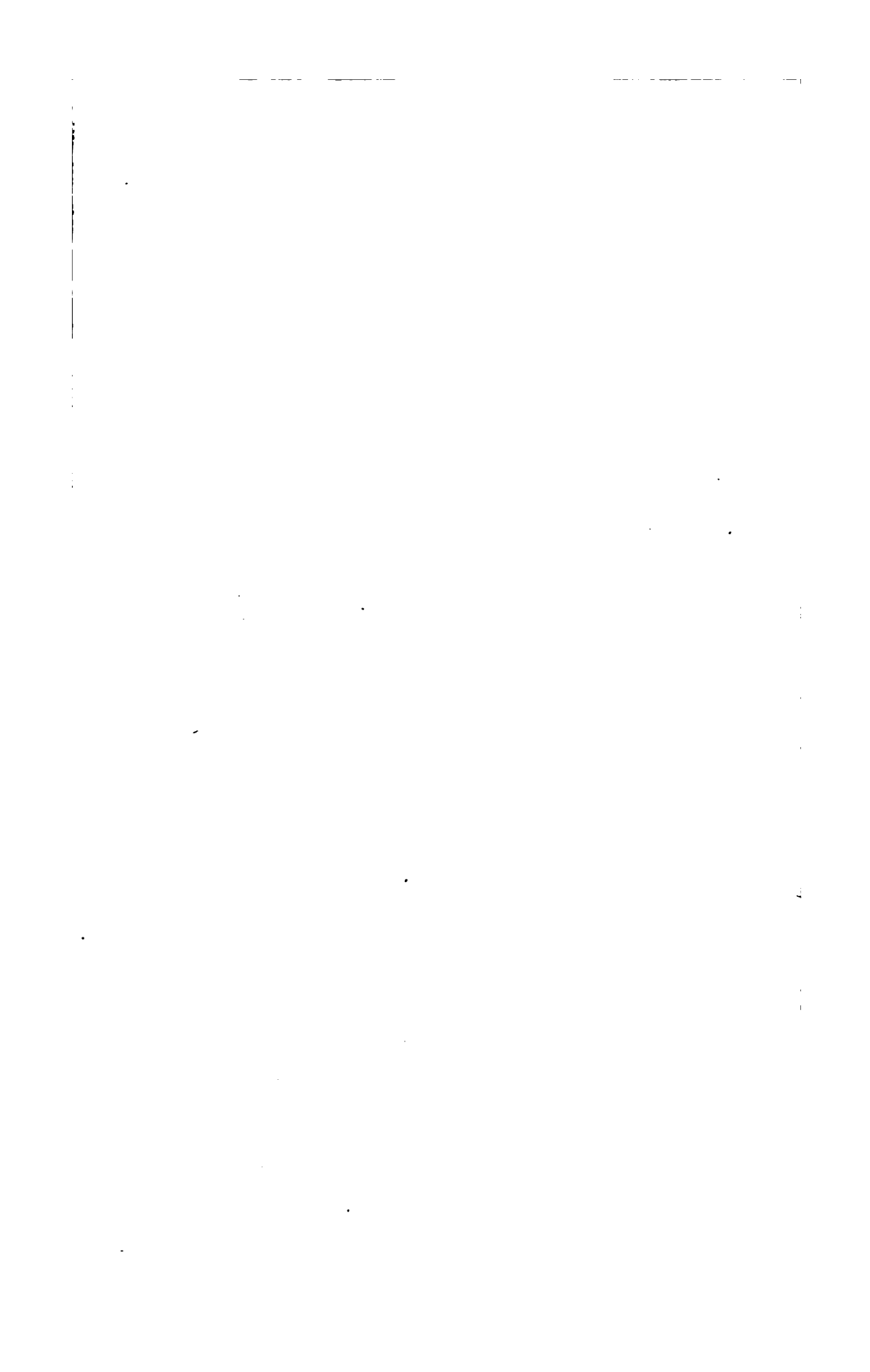
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

WITH ADDITIONAL CASES DECIDED DURING THE SAME PERIOD, SELECTED FROM THE CONTEMPORANEOUS REPORTS AND FROM THE DECISIONS IN THE HOUSE OF LORDS,
WITH REFERENCES TO DECISIONS IN THE AMERICAN COURTS.

VOL. CIII.

CONTAINING

THE CASES DETERMINED IN THE COURT OF COMMON PLEAS, AND IN THE EXCHEQUER CHAMBER, IN MICHAELMAS TERM AND VACATION, 1861, AND HILARY TERM AND VACATION, 1862, XXIV. VICTORIA.

SAMUEL DICKSON, Esq.,
EDITOR.

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OF
THE COURT OF COMMON PLEAS
DURING THE PERIOD OF THESE REPORTS.

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CASES

UPON

APPEAL FROM DECISIONS OF REVISING BARRISTERS,

ARGUED AND DETERMINED

IN

THE COURT OF COMMON PLEAS,

IN

Michaelmas Term,

XXV. VICTORIA. 1861.

City of LONDON.

WILLIAM ENDELL LUCKETT, Appellant; FREDERICK ROBERT GILDER, Respondent. *Nov. 11.*

WILLIAM ENDELL LUCKETT, Appellant; WILLIAM VOLLER, Respondent.

WILLIAM ENDELL LUCKETT, Appellant; JAMES GOLLOP, Respondent.

The notice (under s. 62 of the 6 & 7 Vict. c. 18) of the appellant's intention to prosecute the appeal must, *if possible*, be served ten *clear* days before the *first* of the days appointed for hearing appeals,—the proviso in s. 64 enabling the Court to postpone the hearing only applying where by reason of the lateness of the period at which the decision of the revising barrister took place there has not been reasonable time between that and the day of hearing for giving the notice.

THESE were appeals from decisions of the revising barrister for the city of London. The cases were dated and signed by the revising barrister on the 11th of October. The cases so signed were duly lodged with the masters within the first four days of Michaelmas *Term, pursuant to the requirement of the 62d section of the 6 & 7 Vict. c. 18, together with the notice *to them* of the intention of the appellant to prosecute the appeals: and the appellant on the 6th of November also gave a similar notice to each of the respond-

ents; but, inasmuch as "the day appointed for the hearing" of appeals in this term was the 11th of November, the last-mentioned notice was not a compliance with the 64th section of the statute, which requires a ten days' notice.

Fawcett, for the appellant,—relying upon the following proviso in s. 64, "Provided always, that, if it shall appear to the said Court that there has not been reasonable time to give or send such notice in any case, it shall be lawful for the Court to postpone the hearing of the appeal in such case, as to the said Court shall seem meet,"—moved that the hearing of these appeals might be postponed until the 19th, which was a further day appointed by the Court for the hearing of registration appeals.—The 62d section enacts, "that every appellant who shall intend to prosecute his appeal shall, *within the first four days* in the Michaelmas Term next after the decision to which such appeal shall relate, transmit to the masters of the Court of Common Pleas the statement in writing so signed by the said revising barrister as aforesaid, and shall also therewith give or send a notice signed by him, stating therein his intention to prosecute the said appeal; and the said appellant shall also give or send a notice, signed by him, to the respondent in the said appeal, stating his said intention duly to prosecute such appeal in the said court." The directions contained in this section have all been duly complied with: but the difficulty arises from the 64th section, which enacts "that no appeal or matter *3] of appeal whatsoever shall in any case,—*except where the conduct and direction of the appeal, or of the answer thereto, shall have been given by order of the Court of Common Pleas, or of any Judge thereof, to any person,—be entertained or heard by the said Court, unless notice shall have been given by the appellant to the masters of the said Court at the time and in the manner hereinbefore mentioned; and *no appeal shall be heard by the said Court in any case where the said respondent shall not appear, unless the said appellant shall prove that due notice of his intention to prosecute such appeal was given or sent to the said respondent ten days at least before the day appointed for the hearing of such appeal.*" [ERLE, C. J.—This matter has been considered upon several occasions; but the non-compliance with the 64th section has always been held fatal: see *Norton, app., The Town Clerk of Salisbury, resp.*, 4 C. B. 32 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 538; *Adey, app., Hill, resp.*, 4 C. B. 38, 1 Lutw. Reg. Cas. 542 n.; *Pring, app., Estcourt, resp.*, 4 C. B. 73, 1 Lutw. Reg. Cas. 543; *Clarke, app., Beaton, resp.*, 5 C. B. 76 (E. C. L. R. vol. 57); *Aldworth, app., Dore, resp.*, 5 C. B. 87, 2 Lutw. Reg. Cas. 67.] In *Pring, app., Estcourt, resp.*, no notice had been served upon the respondent at all. But, in *Palmer, app., Allen, resp.*, 5 C. B. 5, 2 Lutw. Reg. Cas. 42, the court, acting under the proviso in s. 64, postponed the hearing. [KEATING, J.—There the decision of the revising barrister took place on the 30th of October, and the day appointed for the hearing of the appeals was the 11th of November. The requirement of the 64th section, therefore, could not be complied with, and consequently the Court thought the case fell within the proviso.] By the very terms of the 62d section both notices are to be given within the first four days of the term. [BYLES, J.—That is not the true grammatical

reading of the section; nor is it agreeable to *the exposition it has received in all the cases. KEATING, J.—In *Adey, app., Hill*, [*4 resp., the case was lodged with the masters, and the notices served on the 2d of November; and, the 11th being the day appointed for the hearing, the Court held the notice insufficient, and refused to postpone the case.]

ERLE, C. J.—I feel bound to refuse this application. The subject underwent elaborate discussion in the case of *Adey, app., Hill, resp. Wilde, C. J.*, there says: “The decision of the revising barrister is to be conclusive, subject to an appeal to this court under certain conditions. One of these conditions imposed upon the appellant is, that he shall give or send a notice, signed by him, to the respondent, stating his intention to prosecute the appeal; and, to make this the more imperative and emphatic, a subsequent clause enacts that ‘no appeal shall be heard by the Court (of Common Pleas), in any case where the respondent shall not appear, unless the said appellant shall prove that due notice of his intention to prosecute such appeal was given or sent to the said respondent ten days *at least* before the day appointed for the hearing of such appeal.’ When the legislature is thus for the first time giving to a court of law jurisdiction, over rights that have always been the subject of such watchful jealousy, it is in a peculiar manner incumbent on the Court to confine itself strictly within the limits prescribed for it. A deliberate deviation from an enactment so express and positive in its terms would induce a mischief much greater than any inconvenience that can arise from the blunder of the appellant in this case.” And that has been followed by many cases since. We cannot, therefore, accede to this application. When the cases are called on in their turn, the Court will dispose of them.

*The rest of the Court concurring,

Fawcett took nothing. [*5

The cases being called on for argument on the 15th of November, and no one appearing for the respondents,

Fawcett asked the Court to reconsider its decision of the 11th, and urged the hardship of the case upon the appellant, who could not foresee that the Court would appoint so early a day for the hearing as must necessarily in some cases preclude the possibility of the 64th section being complied with, inasmuch as the 32d section of the statute enables the revising barrister to hold his sittings down to the 31st of October.

ERLE, C. J.—I do not feel at liberty to entertain this application. We are here exercising a special and limited jurisdiction. The point now pressed upon our attention has received the deliberate decision of this Court more than once. The ten days’ notice to the respondent must be given ten clear days before the first of the days appointed for hearing these appeals. All the arguments which have been urged before us were strenuously pressed and duly considered upon the occasions which I have alluded to. The Court more than once has declined to yield to the suggestion of hardship where the day of hearing was appointed within the first ten days of the term, provided there has been reasonable time since the decision took place for giving the notice. If this had been *res integra*, I should probably have

thought that the affidavit disclosed a reasonable excuse for the delay in these cases. I have looked carefully into the matter: and, seeing *6] that the decisions of the revising barrister took place so long ago as the 11th of October, I do not see how we can, consistently with the numerous decisions, allow this notice to avail. We will take care that the cause of complaint does not arise again.

WILLIAMS, J.—I am entirely of the same opinion. I do not see how the cases which have been referred to could, consistently with the provisions of the statute, have been differently decided.

BYLES, J.—I agree with my Brother Williams that we have no power to accede to this application. We are sitting here in the exercise of a new and peculiar jurisdiction; and I think we should be highly censurable if we trespassed in any degree beyond the limits which have been marked out for us.

KEATING, J.—I agree with the rest of the Court in thinking that the words of the statute, as well as the decisions which have been referred to, leave us without any discretion on the subject.

Appeals dropped.(a)

(a) In *Grover, app., Bontems, resp.*, 4 C. B. 70 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 544, it was held that an application by the respondent for leave to deliver paper-books after the proper time, did not dispense with the notice required to be served upon him by the 6 & 7 Vict. c. 18, ss. 62, 64.

*7] , *Borough of NEW WINDSOR.

ROBERT BRIDGEWATER, Appellant; BENJAMIN CHANDLER DURANT, Respondent. Nov. 11.

The claimant, as one of the lay clerks of Windsor, occupied a house of more than 10*l.* a year value. It appeared that he was appointed a lay clerk by the dean and canons of Windsor, in whom was the freehold; that a certain number of houses are occupied by the lay clerks, but that, as there were more lay clerks than houses, the juniors on their appointment received 20*l.* additional salary until one became vacant; that then the salary was reduced by the 20*l.*, and the clerk had the vacant house; that his residence therein was not necessary for the performance of his duties; but that he could not let the house without the consent of the dean and canons. There was no evidence of any statutes regulating the appointment of the lay clerks, though it was supposed that some existed; but the claimant stated that he believed he held his office for life, or so long as he did his duties:—Held, that the claimant was not entitled to be registered as a voter for the borough, either as owner or as tenant, under the 2 W. 4, c. 45, s. 27.

At a Court held for the revision of the list of voters for the borough of New Windsor, Robert Bridgewater claimed to have his name inserted in the list.

The claimant has occupied a house in the lower ward within the borough about fourteen years. He occupies as a lay clerk, to which office he was appointed by the dean and canons of Windsor seventeen years ago. The freehold of the house is in the dean and canons. Its value is above 10*l.* a year. It is extra parochial. A certain number of houses are occupied by lay clerks. There are more lay clerks than houses; and the juniors receive 20*l.* a year more salary till a house becomes vacant. The salary is then reduced by the 20*l.* The lay clerk may then take the house, but is not obliged to reside. He can

perform all his duties without residing in the house; but he cannot let it without the permission of the dean and canons.

The claimant on his appointment took the oath of allegiance and some other oath. He believes that he holds his office for life, or so long as he does his duties. He has never seen the statutes of the dean and canons. He has no doubt there are such statutes; but he has no right of access to them, and he has made no attempt to see them or procure any evidence from them. He knows no book relating to his office but the check *book, in which his name is entered, and [*8 which he sees once a month.

The revising barrister held that these facts did not show a sufficient occupation either as owner or tenant, and refused to insert the claimant's name on the list of voters.

If the Court should be of opinion that his decision was erroneous, the claimant's name was to be inserted in the list, thus,—

Christian and surname.	Place of abode.	Nature of qualification.	Street, &c., where situate, &c.
Bridgewater, Robert.	30, Lower Cloisters.	House.	30, Lower Cloisters.

Six other persons claimed to be placed on the list for similar qualifications; and their cases were consolidated with the principal case.

Macnamara, for the appellant.—The claimant was entitled to be registered as the occupier of a house as tenant within the 27th section of the Reform Act, 2 W. 4, c. 45. He does not occupy as servant, and therefore the case is distinguishable from those in which it has been held that one who is *required* to occupy premises with a view to the more efficient performance of his duties as surgeon to a hospital, or as hall-keeper, does not become a “tenant” within the meaning of the statute,—*Dobson*, app., *Jones*, resp., 8 Scott N. R. 80, 5 M. & G. 112 (E. C. L. R. vol. 44), 1 Lutw. Reg. Cas. 105; *Clark*, app., *Bury St. Edmunds (Overseers)*, resp., 1 C. B. N. S. 23 (E. C. L. R. vol. 87), 1 K. & G. 90. The case falls within the principle laid down in *Hughes*, app., *Chatham (Overseers)*, resp., 7 Scott N. R. 581, 5 M. & G. 54, 1 Lutw. Reg. Cas. 51. There, an officer in the service of Government had as such a house in the dock-yard at Chatham for his *residence: he paid no rent in money for it, but had it as part [*9 remuneration for his services: and no part of it was used for public purposes: if he had not been allowed the house, he would have had an allowance for a house, in addition to his salary: and this was held to be an occupation as “tenant” within s. 27. In giving judgment, *Tindal*, C. J., there says: “There is no inconsistency in the relation of master and servant with that of landlord and tenant: a master may pay his servant by conferring on him an interest in real property, either in fee, for years, at will, or for any other estate or interest; and, if he do so, the servant then becomes entitled to the legal incidents of the estate, as much as if it were purchased for any other consideration. But it may be that a servant may occupy a tenement of his master, not by way of payment for his services, but

for the purpose of performing them : it may be that he is not *permitted to occupy* as a reward, in the performance of his master's contract to pay him ; but *required to occupy*, in the performance of his contract to serve his master." Referring to that decision, Tindal, C. J., in delivering the judgment of the Court in *Dobson, app., Jones, resp.*, thus expresses himself: "In delivering our opinion upon a former case, we laid down at some length the principle upon which we thought the class of cases to which the present appeal belongs ought to be decided; and we drew the distinction between those cases where officers or servants in the employ of the Government are *permitted to occupy* a house belonging to the Government as part remuneration for the services to be performed, and those in which the places of residence are selected by the Government, and the officers or servants are *required to occupy* them with a view to the more efficient performance of the duties or services imposed upon them. And upon that occasion

*10] we declared our *opinion that those officers or servants who fell within the first description might properly be considered to occupy as tenants, although the residence was allotted to them as such officers or servants, and although they might, if such residence had not been allotted to them, have had an additional allowance for lodging-money; whilst, at the same time, we stated that the relation of landlord and tenant could not be created by the appropriation of a particular house to an officer or servant as his residence, where such appropriation was made, not with a view to the remuneration of the occupier, but to the interest of the employer and the more effectual performance of the service required from such officer or servant; upon the same principle as the coachman who is placed in rooms of his master over the stable, or the gardener who is put into a house in the garden, or the porter who occupies the lodge at a park-gate, cannot be considered to occupy as tenants, but as servants merely, whose possession or occupation is strictly and properly that of their master."

[ERLE, C. J.—Where the occupation by the servant is permissive only, and by way of part remuneration for his services, he is substantially paying rent for the premises.] That is precisely the case here. The case finds that the juniors receive 20*l.* a year more salary till a house becomes vacant. The restriction against letting cannot make any difference: that is common to many tenancies. [WILLIAMS, J.—What sort of a tenant do you say the claimant is?] It is unnecessary to define the nature of the tenancy: it is enough to say that he is a tenant of some sort. [KEATING, J.—A tenancy at will would be sufficient.] Neither is this like the cases where an occupation of a house or rooms as the recipient of charity has been held to be insufficient to confer the franchise: see *Heath, app., Haynes, resp.*, 3 C. B. N. S. 389 (E. C. L. R. vol. 91); *Heartley v. Banks*, 5 C. B. N.

*S. 40 (E. C. L. R. vol. 94). In the former the occupation was *11] held to be an occupation by the corporation in the persons of its several members: and in the latter the legal estate was in the dean and canons of Windsor.

Griffiths, for the respondent.—Upon the evidence which the claimant thought fit to lay before him, the revising barrister was well warranted in coming to the conclusion that his claim was not well founded. It was entirely a question of fact. In *Heath, app., Haynes, resp.*, the

inmates were rated in respect of their several occupations, and yet they were held not to occupy as tenants. Here, as there, there is an entire absence of anything in the circumstances under which the occupation arises which creates either expressly or by implication the legal relation of landlord and tenant. [BYLES, J.—It is expressly found that the lay clerk is not bound to reside in the house provided for him. ERLE, C. J.—I gather from the statements in the case that the dean and chapter pay the lay clerk a salary and put him into a house, the salary being diminished by 20*l.* a year as soon as a house is provided for him; that residence in the house is not necessary for the performance of the duties of the office; and that the lay clerk may, with the permission of the dean and chapter, let the house.] All these statements must be taken with the fact that the statutes were not produced. [BYLES, J.—There is nothing upon the face of the case that is inconsistent with this person being strictly a tenant at will.] If the proper evidence had been brought before the revising barrister, as in *Heartley, app., Banks, resp.*, the same result must have been come to. [WILLIAMS, J., referred to *Gleaves v. Parfitt*, 7 C. B. N. S. 838 (E. C. L. R. vol. 97), where a vicar choral of the cathedral church of Wells was held to have such an interest in his house of residence as to render his *personal representative liable to an action at the suit of his successor in the vicarage for dilapidations.] The case states that the freehold is in the dean and canons; and there was no sufficient evidence before the revising barrister as to the real position of the claimant, to justify him in coming to the conclusion that he occupied the house in question in the character either of owner or tenant.

Macnamara, in reply.—It is surmised, but it is not *found*, that there are any statutes which could throw any light upon the nature and extent of the claimant's interest. But enough appears to warrant and to require the conclusion that he occupied as a tenant of some kind. There was no evidence in *Hughes, app., Chatham (Overseers), resp.*, to show how the tenancy was commenced. Its existence was assumed in the absence of evidence to the contrary. *Cur. adv. vult.*

ERLE, C. J., on a subsequent day, delivered the judgment of the court: (a)—

In this case the revising barrister states the facts which were proved relating to the occupation of a house by the claimant, and suggests other facts which were not proved, and decides that he is not satisfied that the claimant, a lay clerk, occupied his house either as owner or as tenant within the statute.

Occupation alone of a house is not sufficient to qualify. Thus, occupation as a member of a corporation aggregate (*Heath, app., Haines, resp.*, 3 C. B. N. S. 389 (E. C. L. R. vol. 91)), or as a receiver of charitable bounty (*Heartley, app., Banks, resp.*, 5 C. B. N. S. 40 (E. C. L. R. vol. 94)), or for purposes *connected with services to be performed (*Dobson, app., Jones, resp.*, 8 Scott N. R. 80, 5 M. & G. 112 (E. C. L. R. vol. 44), 1 Lutw. Reg. Cas. 105; *Clark, app., The Overseers of Bury St. Edmunds, resp.*, 1 C. B. N. S. 32 (E. C. L. R. vol. 87), 1 K. & G. 90), or under an appointment from governors of a charity at their discretion (*Davis, app., Waddington, resp.*, 8

(a) The argument took place before Erle, C. J., Williams, J., Byles, J., and Keating, J.

Scott N. R. 807, 7 M. & G. 37 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 159), have been held not to qualify.

The question is one of fact; and it was for the revising barrister to draw his conclusion from the premises before him.

Upon the statement of the case, we do not find any proof that the appointment of a lay clerk, together with an assignment of a house for his occupation, necessarily created any legal or equitable freehold interest in the house and vested it in him; and we therefore see no reason why the decision of the revising barrister should be wrong.

Decision affirmed.(a)

(a) See Hall, app., Lewin, resp., post, p. 114. See also, as to charitable foundations, Freeman, app., Gainsford, resp., post, p. 68.

*14] *County of WILTS,—Southern Division.

JOHN THOMAS COLLIER, Appellant; FREDERICK KING,
Respondent. Nov. 11.

The minister of a congregation of "Particular Baptists" occupied copyhold premises (of sufficient value), which were vested in trustees, upon trust, among other things, "to permit and suffer the said dwelling-house and premises to be held, used, and occupied by the minister of the said congregation for the time being as and for his place of abode and residence." The deed contained no direction as to the mode of appointment of the minister, or any power for his removal. It appeared that the minister had, in the year 1847, upon the written invitation of the deacons, undertaken the ministry for a probationary period of three months; at the expiration of which period he, in accordance with a second (verbal) invitation in general terms, remained as minister of the congregation, and had ever since so continued, and occupied the premises as such. The evidence relied on to prove an appointment *for life*, consisted of his own statement that *he so considered it*, and the statement of one of the deacons (who had been a member of the congregation for thirty-five years), that the appointment was made in the usual way, and was, in his opinion, for life.

The revising barrister having decided, that, assuming all the facts stated to be true, they did not amount to an appointment for life:—Held, that the question was strictly speaking one of fact, and that, although the revising barrister *might* have inferred that the appointment was for life, it was not a *necessary* inference, and therefore his decision must be affirmed.

At a court held for the revision of the lists of voters for the southern division of the county of Wilts, Frederick King objected to the name of John Thomas Collier being retained in the list of voters for the parish of Downton.

John Thomas Collier is minister of a dissenting congregation called Particular Baptists, at Downton, and stood on the register for South Wilts as owner and occupier of a "copyhold house and garden, South Lane, Downton."

By deed dated the 25th of September, 1813, the property in respect of which he claimed to be registered appears to be vested in trustees upon certain trusts, and, amongst others, "that the trustees and the survivors and survivor of them, and the heirs of such survivor, or such new and other trustees as aforesaid, do and shall from time to time and at all times for ever hereafter permit and suffer the said dwelling-house and premises thereto belonging to be held, used, and occupied by the minister of the said congregation for the time being as and for his place of abode and residence."

There is no direction in the deed as to the mode by which the

minister should be appointed; nor any *power given for his removal. It appeared that, in the year 1847, the said John Thomas Collier received a letter from three deacons of the congregation, of which the following is a copy :—

“From the Particular Baptist church at Downton, to Mr. John Thomas Collier, at the Baptist College, Bristol.

“From the two visits you have paid us in the capacity of a supply, from the intercourse we have had with you, and from the enjoyment and profit we have experienced under your ministry, we have acquired a conviction of your adaptation and qualifications to take the oversight of us in the Lord. In accordance with which, we herewith cordially and unanimously invite you to become our pastor. But, in doing so, we leave it entirely to your own judgment whether you will, without any further knowledge of us, at once accede to the invitation, or whether you would prefer to come amongst us for three months longer on probation before you decide, in order that you and we may enjoy the satisfaction of a more marked intimation of the Divine will.

“Aware of the solemnity of the step we are taking, and of the sacredness of the relation subsisting between a pastor and a people, we would earnestly pray, that, should that relation subsist between yourself and us, it may be richly realized beneath the most expressive tokens of the Divine benediction.

“Most devoutly commending you to the wisdom and blessing of the great Head of the church,

“JOHN ANDREWS, }
 “WM. EASTMAN, } Deacons.”
 “JAMES MITCHELL, }

In accordance with the request contained in the above letter, the said John Thomas Collier undertook *the duties of minister to the said congregation for a probationary period of three months. [*16 At the expiration of that time, he received verbally a second call in general terms to become the minister of the congregation; which he accordingly did, and still remains so; and in such capacity he has ever since occupied the premises, in respect of which he now stands on the register, and which are of sufficient value to qualify him to vote, if otherwise entitled.

The proof of his appointment for life consisted of his own statement that he so considered it, and the evidence of one of the deacons, who had been a member of the congregation for thirty-five years, that the appointment was made in the usual mode, and in his opinion was for life.

It was objected that the said John Thomas Collier, under the circumstances above mentioned, was not legally appointed for life, and did not take such an interest by virtue of the said office as would qualify him to be retained on the register.

On the other side it was insisted, that, from the above facts, it was shown that such appointment constituted a freehold interest sufficient to establish the said John Thomas Collier's right to be so retained.

The revising barrister was of opinion that the right of the said John Thomas Collier to be retained on the register was not established, and accordingly expunged his name. If the Court should be of opinion

that the revising barrister was wrong in this decision, the name of John Thomas Collier was to be restored to the register.

Welsby, for the appellant.—The decision of the revising barrister upon the facts before him was clearly erroneous. All we learn of the deed which regulates the property in respect of which the claimant *17] seeks to *be registered, is, that the trustees in whom it is vested are from time to time and at all times thereafter to permit and suffer the said dwelling-house and premises thereto belonging to be held, used, and occupied by the minister of the said congregation for the time being as and for his place of abode and residence. Nothing is said as to the mode of appointment of the minister, nor as to his removal. The evidence that the appointment was for life, was, the claimant's statement, corroborated by one of the deacons, that "they so considered it." In *Burton*, app., *Brooks*, resp., 11 C. B. 41 (E. C. L. R. vol. 73), 2 Lutw. Reg. Cas. 197, which was in every respect like the present case, the minister of a dissenting congregation, whose appointment, according to his own statement, was "general, and for life," occupied, by permission of the trustees, in whom the legal estate was vested, without paying any rent, a cottage and premises worth more than 40s. per annum. The revising barrister, considering that it was established in point of fact that the minister held the office and occupied the house and premises under the trusts of the deed, and therefore had such a freehold interest therein as entitled him to vote, retained his name on the list of voters: and the Court held that he had come to a right conclusion; *Jervis*, C. J., saying, "Upon the finding of the barrister, we must assume that the appointment of the minister was *for life*, under the trusts of the deed. He has, therefore, an equitable freehold for life, and is entitled to vote." In *Rogers on Registration*, 7th edit. 125, it is said: "At the Yorkshire election, at which Mr. Justice Bayley and Serjt. Heywood attended as assessors, some of the protestant dissenting ministers, who said they *believed* themselves to be elected for life, and could not be removed, were admitted; others declared that they understood they might be removed *18] at pleasure, and were *rejected." (a) Mr. Rogers upon this observes: "There can be no general rule applicable to all cases of dissenting ministers; each case must be judged of according to its own circumstances, the terms of the appointment, or the customs of the particular body by whom the appointment is made. In some dissenting congregations, the first call to a minister is for a limited and probationary term; when such term expires, if the minister be approved, he receives a second call or invitation in general terms, to become the minister of the congregation: in such cases there can be little doubt but that, by analogy to other appointments in general terms, such an appointment is in law an appointment for life: in others, the minister holds at the will of the trustees or congregation. Sometimes, indeed, the trustees of chapels, having the sole interest in themselves, subject to the condition of allowing the use to some congregation mentioned in the deed or will, permit a particular minister to use the chapel: in such cases there would be nothing to warrant the presumption of an appointment for life: *Doe d. Jones v. Jones*, 10 B. & C. 718 (E. C. L. R. vol. 21), 5 M. & R. 616; *Doe d. Nicholl v.*

(a) See *Heywood on County Elections*, p. 133.

McKaeg, 10 B. & C. 721, 5 M. & R. 620. When the facts in these cases of dissenting ministers are once ascertained, there will be no difficulty in applying the rules of law to them; but to act upon *the belief* of the party interested, however respectable, seems a very unusual test, and most unsatisfactory mode of proceeding." [KEATING, J.—Mr. Elliott says (Elliott on Registration, 2d edit. 31): "In these cases it is difficult to understand in whom is vested the power to appoint absolutely for life; the trustees hold the chapel only for the use of the congregation for the time being, and have nothing to do with the *appointment of the minister; the congregation themselves are a fluctuating body, and as such cannot bind their successors. [*19 And it would rather seem, as argued by counsel in the Bedfordshire Case, 2 Luders 435, that, whatever the usage of the different congregations may be, in point of law the office depends upon the pleasure of the persons composing them. They are all voluntary associations, and may be dissolved when the congregations please: if they cease to meet, the ministry ceases with them, for, where there is no congregation, there can be no pastor." This case, it is submitted, must be governed by that of Burton, app., Brooks, resp.]

Coleridge, Q. C., for the respondent.—The revising barrister was right in the conclusion he came to. It is unnecessary to distinguish this case from Burton, app., Brooks, resp. That case, indeed, when looked at carefully, will be found to be an authority in favour of the respondent. Jervis, C. J., there assumes the fact that the appointment was for life; and, upon that assumption, he holds that the minister had a freehold interest. But what is true of one congregation is not so of another: in each case it is a question of fact, depending upon the evidence, whether the party holds for life or not. If for life, it is a freehold interest; otherwise not. It is, of course, difficult to define exactly the nature of the tenure, without knowing something more of the mode of appointing. In the absence of any specific and distinct evidence, or usage, the majority of the members of the congregation would probably determine from time to time who was to be the minister. [BYLES, J.—The congregation may decline to continue their subscriptions: but, suppose the minister chooses to continue to preach without emolument?] It must be, as Mr. Rogers says, a question of fact in each case. [WILLIAMS, J.—The case of Burton, *app., Brooks, resp., gets over the difficulty of imagining an appointment for life, in the case of a thing which is not properly an office.] If land is attached to the office, the Statute of Frauds would require the appointment to be in writing. [WILLIAMS, J.—In *Rex v. Barker*, 3 Burr. 1265, where a mandamus was issued to trustees to admit a dissenting teacher, Lord Mansfield calls it a "function."]

Welsby, in reply.—It is plain that the revising barrister here was dealing with a question of law, and not of fact. The case of *Rex v. Barker* was considered in *The King v. Jotham*, 3 T. R. 575. Burton, app., Brooks, resp., must govern this case: it would be highly inexpedient to allow two revising barristers to come to precisely opposite conclusions upon the same state of facts.

The Court directed the case to be sent back to the revising barrister to certify whether he meant to say that he was not satisfied that in point of fact an appointment for life was proved, or whether, assuming

all the facts stated to be true, he was of opinion that they could not in point of law amount to an appointment for life.

The revising barrister thereupon appended to the case the following certificate:—

"In compliance with the direction of the honourable Court, I beg respectfully to state that I was satisfied with the proof of such facts as are set out in the above case; but was of opinion, that, assuming all the facts stated to be true, they did not in law amount to an appointment for life.

J. A., Revising Barrister."

Cur. adv. vult.

*21] *ERLE, C. J., on a subsequent day, delivered the judgment of the Court: (a)—

In this case the appellant claimed to be qualified by an equitable freehold in a house which was vested in trustees in trust for the minister for the time being of a dissenting congregation called Particular Baptists, at Downton, in the county of Wilts.

The case sets forth a letter signed by three deacons, requesting the appellant to become the minister after three months' probation, a call in general terms to become the minister, and a continuance in that capacity from 1847. The further evidence in support of the duration of his appointment was, the statement of himself and one of the deacons, who had known the usage for thirty-five years, that they considered it to be for life.

The revising barrister decided, that, from these facts, he did not draw the conclusion that the appointment was for life: and we are to say whether that decision is wrong in point of law.

The facts found do not necessarily prove that the general appointment operated as an appointment for life. The barrister had by law the duty of stating what inference he drew from the premises before him: and, although he might have inferred that the appointment was for life, it is not a necessary inference.

In *Burton, app., Brooks, resp.*, 11 C. B. 41, the revising barrister did infer that the appointment was for life; and the Court affirmed his decision: and *Maule, J.*, approved of it. Still it must be noted that there was additional evidence in that case; for, the deed creating the trust expressed it to be for the life of the minister therein named; so *22] that the *existing appointment at the time of the deed was clearly for life; and it might well be presumed that subsequent appointments would also be for life, if no change was indicated.

In *The Attorney-General v. Pearson*, 3 Meriv. 420, Lord Eldon directed an inquiry to be made by the master, to ascertain whether a general appointment of a dissenting minister had there operated as an appointment for life. This direction is more fully stated at the conclusion of this judgment. In *Porter v. Clarke*, 2 Simons 520, the appointment was general; and the Vice-Chancellor refused to infer that it was for life; but he relied much on the fact that there was no house and no endowment for the minister, and nothing beyond voluntary contributions.

Although the question referred to us is strictly speaking a question of fact, it is probably sent to us in order that some principle may be

(a) The judges present at the argument were, Erle, C. J., Williams, J., Byles, J., and Keating, J.

suggested for future guidance. We therefore add that the question is the same as that which would arise in equity if the trustees brought ejectment against the minister without any legal cause for removal, and the minister applied for an injunction to stay the action. Lord Eldon, for his guidance upon that point, in *The Attorney-General v. Pearson*, above cited, directed the master to inquire as to the usage in respect of the duration of the office, and particularly whether any agreement or understanding was entered into between the minister and the persons for the time being members of the congregation attending the meeting-house and subscribing to its support, touching the ministry of the minister.

According to the result of such an inquiry upon the duration of the appointment would be the decision of the revising barrister for or against the qualification. Decision affirmed.

*County of KENT.—Western Division. [*23

CHARLES EDWARD LEWIS, Appellant; THOMAS NICHOLS ROBERTS, Respondent. Nov. 11.

In order to prove the transmission by the post of a notice of objection "signed by the objector," under the 6 & 7 Vict. c. 18, s. 100, it is sufficient to produce before the revising barrister the stamped duplicate returned by the postmaster to the person producing it, so signed.

At a Court duly held on the 14th of October, 1861, for the revision of the lists of voters for the parishes in the polling district of Blackheath, in the western division of the county of Kent, John Innous (on the register of voters for the parish of Bromley, in the said division), objected to the name of Thomas Lovitt Howard being retained on the list of voters for the parish of Plumstead.

A paper writing in the following form,

"To Mr. Thomas Lovitt Howard,
of Eve Cottage, Powis Street, Woolwich.

"Take notice that I object to your name being retained in the Plumstead list of voters for the western division of the county of Kent.

"Dated this 20th day of August, 1861.

"JOHN INNOUS,
"On the register of voters for the
parish of Bromley."

purporting to be a duplicate of the notice of objection, stamped at a proper post-office on the 24th of August last, was produced before the revising barrister; and it was proved, that, in due course of post, the original notice would have reached the voter on or before the 25th of August last. The signature to the said paper writing or duplicate was proved to be in the handwriting of the said John Innous; and the identity of the person signing the said duplicate notice with the person of that name on the Bromley list of voters was proved; but no proof was given before the revising barrister that the original notice of objection, of which *such paper writing purported to be a [*24 duplicate, had been signed by the said John Innous, other than

the production of such stamped duplicate so signed by him as aforesaid.

The notice of objection to the overseers in the same case was duly proved.

It was contended on behalf of the said Thomas Lovitt Howard that the production of such stamped duplicate notice of objection was no evidence that the original notice of objection retained by the postmaster to be sent to the said Thomas Lovitt Howard, was signed by the party objecting, as required by the 6 & 7 Vict. c. 18, s. 7. The original notice was not produced.

The said Thomas Lovitt Howard did not prove his qualification: and the revising barrister held that the notice of objection to him was valid, and expunged his name from the list. The name of James Jacobs was expunged from the same list of voters under the same circumstances.

If the Court should be of opinion that such notice of objection was invalid, the names of the said Thomas Lovitt Howard and James Jacobs were respectively to be restored to the list of voters for the said parish of Plumstead, and the register of voters was to be amended accordingly. If the court should be of opinion that such notice of objection was valid, the said register was to stand without amendment.

Macnamara, for the appellant.—The question is whether, in order to prove the transmission of a notice of objection by the post “signed by the objector,” under the 100th section of the 6 & 7 Vict. c. 18, it is sufficient to produce before the revising barrister the stamped duplicate returned by the postmaster to the person posting it, without also *25] showing that the *original notice so transmitted was actually signed by the objector. It is submitted that it is not. The 7th section provides that the notice of objection shall be “signed by the party objecting:” and in *Toms, app., Cuming, resp.*, 8 Scott N. R. 910, 7 M. & G. 88 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 200, it was held that this notice, as well as the duplicate, where the notice is sent by post, must be personally signed by the objector himself. In that case, Tindal, C. J., referring to the language of s. 17 (which is similar to that of s. 7), and to the form given in the schedule, says: “The natural meaning of these words is, that there shall be a *personal* signature. And there is great reason and good sense in such an enactment. If the objector were unknown, and was at liberty to get some one else to sign the notice, there might be great difficulty in obtaining costs from him. Some shuffling person might be put forward in his stead; and great inconvenience and vexation might be the result.” By s. 40, the objector is bound to prove that he gave the notice required by the act. And by s. 100 it is declared to be sufficient if the notice is sent by post (post-free), directed to the person objected to, at his place of abode as described in the list; and the section goes on to provide, that, “whenever any person shall be desirous of sending any such notice of objection by the post, he shall deliver the same duly directed, open and in duplicate, to the postmaster of any post-office where money orders are received or paid,” &c.; and “the postmaster shall compare the said notice and the duplicate, and, on being satisfied that they are alike in their address and in their contents, shall forward one

of them to its address by the post, and shall return the other to the party bringing the same, duly stamped with the stamp of the said post-office; and the production by the party who posted such notice of such stamped duplicate shall be *evidence of the notice [*26 having been given to the person at the place mentioned in such duplicate on the day on which such notice would in the ordinary course of post have been delivered at such place." In the present case, the objector contented himself with producing the stamped duplicate, signed by him: but there was no evidence that the original notice transmitted by the postmaster was signed by the objector himself. The stamp on the duplicate produced was no authentication by the postmaster of the genuineness of the signature either to the original or to the duplicate. That was no part of his duty; nor had he any power to inquire into the fact. Indeed, so little importance is attached to the performance of this duty, that it was held in *Allen, app., Waterhouse, resp., 8 Scott N. R. 68, 1 Lutw. Reg. Cas. 92*, that it need not be the personal act of the postmaster himself, but may be performed by a clerk or servant in his office.

Tindal Atkinson, for the respondent.—The two documents delivered to the postmaster must in *all* respects correspond. In *Birch, app., Edwards, resp., 5 C. B. 45 (E. C. L. R. vol. 57), 2 Lutw. Reg. Cas. 37*, the absence of an *external address* upon one of them was held to be a fatal objection. In fact they are both originals, and must both be signed. [WILLIAMS, J.—It is, you say, the duty of the postmaster to satisfy himself that the signature to each is the same?] Undoubtedly. *Toms, app., Cuming, resp.*, shows that both must be personally signed by the objector: and the postmaster, after comparing them, is at liberty to send which he pleases. In *Bishop, app., Helps, resp., 2 C. B. 45, 52 (E. C. L. R. vol. 52), 1 Lutw. Reg. Cas. 353, Maule, J.*, suggests that "the legislature, as to the evidence, only meant to substitute the stamped duplicate for the original, which it might be difficult to procure." And when, in the course of the argument *in *Toms, app., Cuming, resp.*, it was urged by counsel that "it is only [*27 necessary to prove the personal signature of the objector to the original notice which is sent to the party objected to," Erle, J., asks "Is not the production of the stamped copy [duplicate] sufficient for *that* purpose?" One can hardly exaggerate the inconvenience which would result from holding the objector bound to do more than produce the stamped duplicate. The legislature manifestly intended that the stamped duplicate should in all respects stand in the position of an original document. In *Toms, app., Cuming, resp., 8 Scott N. R. 917, Maule, J.*, says: "The true definition of the term 'duplicate,' is, a document which is the same in all respects as some other instrument, from which it is indistinguishable in its essence and in its operation. It is a very different thing from an examined copy; although an examined copy may be a duplicate under certain circumstances." [BYLES, J.—Suppose through some default of the post-office the notice fails to reach the person to whom it is addressed in due time or at all, the objection would still be good.] In *Bishop, app., Helps, resp.*, the notice did not reach its destination until after the 25th of August, and yet it was held valid. [WILLIAMS, J.—The postmaster is to be satisfied that the two documents are alike "in their address and in

their contents," not that the handwriting is the same.] They would not be alike in their contents, if one was a valid notice, and the other not.

Macnamara, in reply.—It could not be denied that the documents might be duplicates though one was as to the body of it in a different handwriting from the other. The Courts have always scrutinized these notices with great strictness.

*28] *ERLE*, C. J.—I am of opinion that the decision of the *revising barrister in this case was right. The evidence was, that the notice of objection, in duplicate, was taken to the post-office, and all the requirements of the 6 & 7 Vict. c. 18, s. 100, complied with, and that one of such duplicates was returned by the postmaster, duly stamped, to the person who brought them, and that the copy so returned was produced at the court of revision, signed by the objector. The question is whether that is evidence that a notice of objection, signed by the objector, was duly served upon the person objected to. The words of the 100th section are, that "the production by the party who posted such notice of such stamped duplicate shall be evidence of the notice having been given to the person at the place mentioned in such duplicate on the day on which such notice would in the ordinary course of post have been delivered at such place." I am of opinion that this provision of the statute was introduced for the purpose of avoiding the necessity of a specific witness going to the place of residence of the voter and there doing all that is usual to effect personal service, and that the objector has complied abundantly with all the legislature has required by doing what was done here. The statute says that the duplicate so dealt with shall be *evidence*,—not conclusive proof,—that the corresponding duplicate was given to the party; and I give effect to that enactment by saying that there was evidence in this case that the notice duly reached the hands of the person objected to. Then, it is said that it was intended that the objector should be identified by his personal signature to the notice. It was decided in *Toms*, app., *Cuming*, resp., 8 Scott N. R. 910, 7 M. & G. 88 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 200, that both the notice and the duplicate must be personally signed by the objector. In that case, one of the documents (that transmitted to the person objected to) was signed by the objector, the other by a clerk by his direction and in his *29] *presence: and this was held to be no compliance with the statute. The Court there say that the true meaning of the term "duplicate" is, a document which is the same in all respects as some other document, from which it is indistinguishable in its essence and in its operation. One of the essentials is, that there shall be the signature of the objector. The document returned to the person who goes to the post-office is not a duplicate unless it is signed, like that transmitted to the person to whom it is addressed, by the objector himself. This construction insures there being a real objector, and prevents the intrusion of a man of straw, because, the objector's own handwriting appearing on both the document which is forwarded and that which is returned to him, he is estopped from denying that he sent a duplicate of that which is produced. The statute has provided that the postmaster shall compare the said notice and the duplicate, and, on being satisfied *that they are alike in their address and in their*

contents, shall forward *one of them* to its address by the post, and shall return the other to the party bringing the same, duly stamped. Part of the contents of the documents undoubtedly is, that both purport to be signed by the same person. Besides, the stamped duplicate, when produced before the revising barrister, is only evidence if produced by the person who posted the one document and kept the other. He must know, and he is the only person who can give strict proof of the fact, that the notice has been duly posted. I am therefore of opinion that the statute has been complied with in this case, and that the decision of the revising barrister is in entire accordance with the case of *Toms, app., Cuming, resp.* The document cannot be a duplicate unless it is the same in all essentials with that of which it professes to be a duplicate. We should be entirely defeating the statute, which meant to give a *short and easy and safe mode of proving the giving of the notice, if we held that what was done here was not [*30 sufficient proof of the notice, without being able to say what the objector must do in order to prove the fact. I am clearly of opinion that the 100th section dispenses with any further proof than the production of the stamped duplicate signed by the objector.

WILLIAMS, J.—I must say it is not without some doubt and difficulty that I concur in what has fallen from my Lord, and which I understand to be the opinion entertained by my two learned Brothers: and I do so, not only out of sincere deference to them, but also because I am desirous of giving full effect to this useful provision of the statute. The grounds upon which I feel some doubt are these:—The 100th section of the 6 & 7 Vict. c. 18, after providing, that, “whenever any person shall be desirous of sending any such notice of objection by the post, he shall deliver the same, duly directed, open and in duplicate, to the postmaster,” &c., goes on to define what the postmaster shall do. He “shall compare the said notice and the duplicate, and, on being satisfied that they are *alike in their address and in their contents*, shall forward one of them to its address by the post, and shall return the other to the party bringing the same, duly stamped with the stamp of the said post-office.” If the words had been, “on being satisfied that they are duplicates,” I should have thought there was strong ground for the argument that both must be signed by the same person. But the statute does not say that: it only says that the postmaster is to be satisfied, on comparing the documents, “that they are alike in their address and in their contents;” and *that* they may well be although they are signed by different persons. Then the section goes on to enact what shall be the effect of the *stamped duplicate: “And the production by the party who posted such [*31 notice of such stamped duplicate shall be evidence of the *notice*” (not of the *duplicate*) “having been given to the person at the place mentioned in such duplicate on the day on which such notice would in the ordinary course of post have been delivered at such place.” That means that it shall be evidence that the notice which is transmitted to its destination by the postmaster, whatever that may be, has come to the hands of the person to whom it is addressed.

BYLES, J.—I agree with my Lord that the production of the stamped duplicate is evidence of the due service of the notice of objection. The statute uses the word “duplicate” as contradistinguished from “draft”

or "copy." In short, it means two originals; which cannot be unless both are signed by the same person. Consider the position of the revising barrister when this question comes before him. The statute says that "the production *by the party who posted such notice* of such stamped duplicate *shall be evidence* of the notice having been given to the person at the place mentioned in such duplicate on the day on which such notice would in the ordinary course of post have been delivered at such place." That refers to the notice required by the 7th section, which is to be "signed by the party so objecting." I think the revising barrister rightly decided that what was done here was sufficient to show that the notice of objection had duly reached the hands of the person objected to; and that, if it were otherwise, the very beneficial effect of this provision would be in a great degree neutralized.

KEATING, J.—I also am of opinion that the revising barrister had
 *32] abundant evidence before him that the *objector had duly sent to the person objected to a notice of objection signed by him. It is material to observe the provision of the statute. The party who wishes to avail himself of the mode of service of the notice of objection given by the 100th section, is to take two papers to the postmaster, one of which is to be transmitted to the person to whom it is addressed, and the other to be returned (stamped) to the person bringing them. It is for the postmaster, and not for the objector, to determine which of the two shall be sent and which returned. That being so, it follows that the document which is returned to the person bringing it, and produced before the revising barrister, must be signed by the objector, and must be satisfactory evidence before the revising barrister that the notice sent to the person objected to was also signed by the objector. The fact of the signature of both being the personal signature of the objector necessarily forms one of the elements of their character of duplicates. The case of *Toms, app., Cuming, resp.*, could hardly have been decided upon any other ground. If the two were not duplicates in the sense of being both signed by the same person, I am inclined to think that proof that the one sent was signed by the objector would have been enough to satisfy the revising barrister. Upon the whole, I am of opinion that the decision was right, and ought to be affirmed.

Decision affirmed.

*33]

*Borough of BRIDGEWATER.

JAMES COOK the Younger, Appellant; JOHN HUMBER,
 Respondent. Nov. 15.

The occupation of "part of a house," without any actual severance from the residue, does not confer a right to vote for a city or borough, under the 2 W. 4, c. 45, s. 27,—non obstante the dictum in *Toms, app., Lockett, resp.*, 5 C. B. 23, 1 Lutw. Reg. Cas. 19.

C. occupied part of a house, consisting of two rooms on the ground-floor and other rooms above on one side of the house, the landlord (who resided on the premises) also occupying two rooms on the ground-floor and the rooms above on the other side of the house,—the rooms on the ground-floor rented by C. having doors into the house-passage or hall, which was shut off from the street by an outer door kept closed night and day; and the rooms on the upper floor

rented by him being approached by a staircase used exclusively by him, and there being no communication between such rooms and the rooms on the other side of the passage. C. had a lock and key to each of his rooms, and both he and his landlord had keys of the street door; and they were rated jointly:—Held, that C. was not qualified to vote as tenant of a “house” within the 2 W. 4, c. 45, s. 27, the “subject of occupation” not being a house, but only a part of a house, without any actual severance from the residue.

At a Court held for the revision of the list of voters for the borough of Bridgewater, John Humber objected to the name of James Cook, the younger, being retained on such list. On such list the name of the appellant appeared thus:—

Christian and surname.	Place of abode.	Nature of qualification.	Street, &c., where property situate, &c.
Cook, James, the Younger.	Bridgewater.	Houses in succession.	Hamp, and Chandos Street.

The following facts were proved before the revising barrister:—During the first portion of the twelvemonth next previous to the last day of July, 1861, the appellant occupied as tenant a house at Hamp, in the borough of Bridgewater, of sufficient value; and, during the remainder of the twelvemonth he resided in a house in Chandos Street, in the said borough, one side of which last-mentioned house he rented at a rent exceeding 10*l.* a year. The rooms on the ground-floor of this house which were rented by the appellant, have doors into the house-passage or hall, which is shut off from the street by an outer door kept closed during night and day. The rooms on the upper floor rented by him are approached by a staircase used exclusively by him, and there is no communication between such rooms and the rooms on the other side of the *passage. The rest of the house is occupied by the appellant's landlord, who is the owner in fee of the whole house, [*34 and who resides on the premises together with his family. The appellant has a lock and key to each of his rooms, and both he and his landlord have keys of the street door; and they are rated jointly. There was no demise in writing to the appellant, the letting being verbal.

The revising barrister expunged the name of the appellant from the list, and held that the facts proved did not show that he occupied as tenant, so as to give him a right of voting under the 2 W. 4, c. 45, s. 27.

If the Court should think otherwise, the name of the appellant was to be reinstated on the list of voters.

Kinglake, Serjt., for the appellant.—The decision of the revising barrister in this case was wrong. It may be conceded that where rooms in a house are hired, the landlord residing on the premises, and having control over the rooms and the access to them, the party hiring is a mere lodger, and acquires no right to vote in respect of his occupation. But, where there is a complete and entire severance of the premises, and the occupier of part has complete control over the access to that part, he is a “tenant” within the 27th section of the 2 W. 4, c. 45, notwithstanding his landlord may occupy and reside on the other part. In the present case, there is a complete severance of the

rooms occupied by the appellant from those occupied by his landlord; and the appellant has a key of the outer door. In *Score, app., Huggett, resp.*, 8 Scott N. R. 919, 7 M. & G. 95 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 198, it was held that a "house" under the statute is not the less a house because it is split up into different demises, where each tenant has a key of the outer door, and the qualification is in *35] other respects sufficient. In that case the landlord *did not reside upon the premises: but the decision is not put upon that ground. Tindal, C. J., says: "In this case, the claimant had the key of the outer door. The case, I think, cannot be distinguished from one where two families occupy one house,—the one family occupying rooms on one side of the staircase, and the other family on the other side." In *Pitts, app., Smedley, resp.*, 8 Scott N. R. 907, 7 M. & G. 85 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 168, the claimant had no key of the outer door, and therefore was held to have a mere permissive occupation as lodger. The next case was *Wansey, app., Perkins, resp., (Hill's Case)*, 8 Scott N. R. 978, 7 M. & G. 151, 1 Lutw. Reg. Cas. 252, the residence of the landlord on the premises was held to disentitle the claimant to be registered. In *Toms, app., Luckett, resp.*, 5 C. B. 23 (E. C. L. R. vol. 57), 2 Lutw. Reg. Cas. 19, it was held that one who has the exclusive occupation of apartments in a house, at a rent, having a key of the outer door, and free and uncontrolled access thereto at all times,—the landlord occupying part of the premises, but not *residing* therein,—is entitled to be registered as tenant of a "building." Maule, J., there says: "The case seems to me to raise, and to have been intended to raise, the question as to the nature, not of the thing occupied, but of the occupation. It is well settled that the exclusive occupation of a floor as tenant will confer a right to vote. But the question here is, whether the occupation of Toms in this case was an occupation as tenant within the meaning of the 27th section of the 2 W. 4, c. 45, or whether his occupation was merely that of a lodger. I think the spirit of the decisions is this,—Where the owner of a house takes in a person to reside in a part of it, though such person has the exclusive possession of the rooms appropriated to him, and the uncontrolled right of ingress and egress, yet if the owner *36] retains his character of master of the house, the individual so *occupying a part of it, occupies it as a lodger only, and not as a tenant within the meaning of the 27th section. The fact of the party having or not having a key of the outer door is not decisive of the question. If he has a key, I cannot conceive that the circumstance of other persons enjoying the same privilege, can make any difference,—he having only a right of way, which would be in no degree affected by his having it in common with others. But the question depends upon whether or not the owner of the house resides upon the premises, retaining his quality of master, and reserving to himself the general control and dominion over the whole. If he does, the inmate is a mere lodger. It does not, however, follow that the owner of the house retains his character of master, merely because he is landlord. He may, indeed, expressly reserve to himself the general superintendence and control, though he do not reside on the premises; but it will not be inferred merely from the fact of his being the landlord." Applying that doctrine to the present case, can any-

thing be more distinct than the part occupied by the appellant from the rest of this house? The passage and staircase divide them; and the landlord has no control whatever over the occupation of his tenant. [ERLE, C. J.—What control has the landlord over any lodger? He has no right to enter his lodger's rooms.(a)] In *Monks v. Dykes*, 4 M. & W. 567,† Lord Abinger says, “a room within a house may be a dwelling-house or it may not.” In *Downing*, app., *Lockett*, resp., 5 C. B. 40, 2 Lutw. Reg. Cas. 33, A. occupied as a counting-house a room in a house, the landlord of which also had a counting-house there, but did not *reside* there: there was an outer door, which was *locked at night; A. had no key of this door, nor was there any key-hole on the outside: a person employed and paid by the land- [*37 lord lived in the house, for the purpose of protecting the premises, and letting in the several tenants when the outer door was closed: and it was held that A. was “tenant” of a counting-house, within the 2 W. 4, c. 27. In opposition to the right of the party to vote, reliance was placed upon the fact of the landlord himself occupying a part of the house, and by his servant retaining such a degree of superintendence over the whole as to prevent any one of the tenants from acquiring that exclusive possession which is essential to confer the right to vote. But *Wilde*, C. J., said: “The question is, whether the circumstance of the landlord having a person living on the premises ‘for the protection of the premises and accommodation of those who occupied counting-houses there,’ in any degree operates to limit the interest granted to the tenant. I am unable to distinguish the case from that of chambers in the Albany, or shops in Burlington Arcade, where there is a common entrance, and a porter in attendance to open the gate, and for the general protection and accommodation of the several occupiers. There is nothing to indicate any intention on the part of the landlord to retain to himself any dominion over the premises, in derogation or in restriction of the rights of the tenant.” Applying the principle of these decisions and these dicta, the facts disclosed upon this case clearly show an occupation as “tenant,” so as to entitle Mr. Cook to have his name retained on the voters’ list.

Kingdon, contrà.—If the cases of *Pitts*, app., *Smedley*, resp., 8 Scott N. R. 907, 7 M. & G. 85 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 168, and *Wansey*, app., *Perkins*, resp. (*Hill’s Case*), 8 Scott N. R. 978, 7 M. & G. 151, 1 Lutw. Reg. Cas. *252, explained as they are by the judgment of the Court in *Toms*, app., *Lockett*, resp., 5 C. B. 23 [*38 (E. C. L. R. vol. 57), 2 Lutw. Reg. Cas. 19, are to be adhered to, the revising barrister was right in holding that the appellant in this case had not the qualification in respect of which he claimed to be retained on the list of voters. An attempt has been made to distinguish this case on the ground that there was a complete severance of the rooms occupied by the appellant from the rest of the premises occupied by the landlord. But the severance was not more complete here than in *Pitts*, app., *Smedley*, resp., and *Wansey*, app., *Perkins*, resp., nor the possession of the occupier more exclusive. [WILLIAMS, J.—I observe, that, in the annual return made to parliament respecting these appeals, *Tindal*, C. J., puts the decision in *Pitts*, app., *Smedley*, resp., on the

(a) See *Hawk. P. C. Book 1, c. 17, ss. 28, 29*: and see *Woodfall’s Landlord and Tenant*, 7th edit. 186.

control over the outer door. BYLES, J.—You do not, of course, deny that the appellant had such a possession of the rooms occupied by him as would entitle him to maintain trespass against one breaking and entering them?] Certainly not. The true principle is laid down by Wilde, C. J., in Toms, app., Lockett, resp., 5 C. B. 35 (E. C. L. R. vol. 57): “A man may have a right to the exclusive possession of apartments in a house, and yet another may have such a degree of dominion over the whole as to denude such possession of the character of a tenancy under the Reform Act. The Court has on various occasions had to consider whether or not the occupier of apartments had, under certain circumstances, such an exclusive occupation as tenant within the meaning of the act as to entitle him to be registered. Where the landlord has been found residing in part of the house, and retaining the key of the outer door, the Court has inferred that he thereby reserved to himself the dominion over the whole of the premises, so *39] as to prevent an occupier of apartments therein from being *deemed a tenant within the Act: Pitts, app., Smedley, resp. So, where the occupier of the apartments likewise had a key of the outer door: Wansey, app., Perkins, resp. (Hill’s Case). But, where the landlord did not reside in or occupy any part of the house, and the lodger had a key of the outer door, the latter was held to occupy as tenant within the statute: Score, app., Huggett, resp.” Thus the Court put it entirely on the fact of residence or non-residence of the landlord. [WILLIAMS, J.—Pitts, app., Smedley, resp., differs from this case in the circumstance of the landlord there retaining the key of the outer door. Wansey, app., Perkins, resp. (Hill’s Case), is exactly like this, only it is not stated there that the claimant had the keys of the rooms occupied by him. BYLES, J.—The case, however, states that he had the “exclusive occupation” of them. WILLIAMS, J.—In Victoria Street, the houses are divided into “flats,” like the old houses in Edinburgh and elsewhere in the north. Suppose the owner of one of those houses himself occupied a flat in it, would that disfranchise all the tenants?] That would probably be held to be a case of distinct buildings. An attempt at a definition of a “lodger” is made by Lord Hardwicke in Fludier v. Lombe, Cas. temp. Hardw. 307, where the question was as to the right of certain persons to vote as *householders* in corporate elections for the city of London, under the 11 G. 1, c. 18. “No man,” says his Lordship, “can be occupier of a house, but either by living in one of his own or one that he hires: a lodger was never considered by any one as the occupier of a house: no part of it can be said to be in his tenure or occupation; and, though he pay rates, yet will he not have the power to vote, not being deemed to be a *householder* or *occupier*. A lodger cannot be said to be an *40] inhabitant, but an inmate under *the tenant.” It is submitted that the decision here was correct, and that the appellant has no vote.

Kinglake, Serjt., was heard in reply.

Cur. adv. vult.

ERLE, C. J., on a subsequent day delivered the judgment of the Court:—

In this case the appellant contended that he was qualified by reason of his occupying the part of the landlord’s house stated in the case, that is, two rooms on the ground-floor and other rooms above on one

side of the house, the landlord occupying also two rooms on the ground-floor and the rooms above on the other side of the house, with separate staircases between, but with one outer door and house-passage common to both, of which door each had a key; and he (the appellant) relied on the cases of *Score*, app., *Huggett*, resp., 7 M. & G. 95 (E. C. L. R. vol. 49), 8 Scott N. R. 919, 1 Lutw. Reg. Cas. 198, and *Toms*, app., *Luckett*, resp., 5 C. B. 23 (E. C. L. R. vol. 57), 2 Lutw. Reg. Cas. 19, in support of his contention.

The respondent contended, that, upon these facts, the appellant was not qualified: and he relied on *Pitts*, app., *Smedley*, resp., 7 M. & G. 85, 8 Scott N. R. 907, 1 Lutw. Reg. Cas. 168, and *Wansey*, app., *Perkins*, resp. (*Hill's Case*), 7 M. & G. 151, 8 Scott N. R. 978, 1 Lutw. Reg. Cas. 252, in support of his contention.

In these four cases the subject of occupation was in substance the same, namely, a part of a house let for lodgings: but the occupation itself was made the subject of distinction. In two of them, the lodger was held to be qualified because his occupation was as tenant: in the other two, the lodger was held not to be qualified because his occupation was as lodger.

In the present case, we are of opinion that the respondent is entitled to succeed; and we rest our *judgment, not upon the kind of [*41 occupation described in the statement, but upon the *subject* of occupation. We consider that the qualification fails, because the subject of occupation was, not a house, but only a part of a house, without any actual severance from the residue. In support of this judgment, we propose to refer to the statute on the construction of which the case depends, and then to consider the four cases cited, and the point for decision in each, together with the distinction between occupation as tenant and occupation as lodger, which does not appear to us to be well founded. We afterwards give our reason for thinking that a part of a house used for residence was not intended by the legislature to qualify under the word "house," or under any of the words that follow relating to qualification.

According to our construction of the statute, the qualification is compounded of four elements,—tenement, value, occupation, and estate. There must be for tenement a house, warehouse, counting-house, shop, or other building analogous thereto: there must be for annual value 10*l.*: there must be occupation, that is, actual exercise of the rights of an owner in possession, during the requisite time: there must be an estate in the tenement, either of fee or less. If these four distinct elements are combined in the claimant, he is qualified; if otherwise, he is not. Now, although they must exist in combination, in order to qualify, still, in inquiring into the existence of the combination, each element must be separately ascertained,—first, is the claimant tenant?—secondly, is he occupier?—thirdly, is the tenement sufficient in value,—and, fourthly, in kind?

In the cases above cited, the question is made to turn upon the nature of the occupation. In *Pitts*, app., *Smedley*, resp., 7 M. & G. 85 (E. C. L. R. vol. 49), 8 Scott N. R. 907, 1 *Lutw. Reg. Cas. 168, [*42 *Pitts* was occupier and tenant of the second and third floors, and had no key to the outer door. The revising barrister's question for the opinion of the Court, was, whether *Pitts* had such an exclusive

occupation of the floors as to qualify. Tindal, C. J., says the question is, whether the claimant occupied as owner or tenant; it does not turn so much on the description of the premises as on the nature of the occupation; and, because he has not the key of the outer door, and the landlord resides on the premises, he does not occupy as tenant.

In Wansey, app., Perkins, resp. (Hill's Case), 7 M. & G. 151 (E. C. L. R. vol. 49), 8 Scott N. R. 978, 1 Lutw. Reg. Cas. 252, Hill was occupier and tenant of the second floor. The landlord resided on the premises; and each had a key of the outer door. The revising barrister referred the question "on the sufficiency of the qualification." The judgment was, that the claimant was a lodger, because the landlord remained in possession of the rest of the house.

In Score, app., Huggett, resp., 7 M. & G. 95 (E. C. L. R. 49), 8 Scott N. R. 919, 1 Lutw. Reg. Cas. 198, Score was tenant and occupier of two rooms on the second floor: the whole house was let in separate lodgings, and each lodger had a key to the outer door: the landlord did not reside: the revising barrister referred the question "whether the *occupation* of such two rooms was sufficient to qualify." The claim in the list had been for "apartments." The Court held that no question was reserved on the sufficiency of that description, and decided for the qualification, because the claimant had the key of the outer door. The Court may have considered that the barrister confined his question to the occupation, and excluded all question on the tenement: and in that view the decision does not conflict with our present judgment.

*In Toms, app., Luckett, resp., 5 C. B. 23 (E. C. L. R. vol. 57), 2 Lutw. Reg. Cas. 19, Toms was tenant and occupier of the first floor in the house. The landlord occupied the shop and parlour, but did not sleep there. The house was let out in lodgings, and each lodger had a key to the outer door. The revising barrister referred the question whether the *occupation* of Toms was sufficient to qualify, as the landlord did not sleep on the premises, and as Toms had no exclusive control over the outer door. The judgment is, that the *occupation* was sufficient, the exclusive control of the outer door not being essential, and the occupation of part by the landlord in the day not having the effect to disqualify which his sleeping there might have had. Three of the Judges add, that a part of a house is a sufficient tenement, being comprised under the words in the statute "other building;" as to which, by referring to the question of the revising barrister, it seems that the point was not before the Court: and it should be noted that Mr. Justice Williams doubted the correctness of the judgment of his brethren on both points, but did not formally dissent from their judgment.

In these four cases, it seems to us, that, if the revising barrister had referred to the Court the true question arising upon the statement of the facts, it would have turned entirely on the sufficiency of the tenement,—the tenancy, the occupation, and the value being clear.

It seems to us that a lodger is a tenant, if the premises are let to him. It was so decided in *Newman v. Anderson*, 2 N. R. 224. There, in replevin, the avowry was for rent of ready-furnished lodgings let at 13s. per week to the plaintiff, and "held by him of the defendant as his tenant thereof." The letting was proved as laid, and thereupon

there was judgment on the avowry for the defendant. If the occupier of the premises is *tenant of them, he occupies them as tenant: [*44 and, if the occupier is tenant of a sufficient tenement as far as concerns the sufficiency of his occupation, it seems to us immaterial to inquire whether he has the key of the outer door; because cases may be put where he would be tenant and occupier, and qualified, although the key should be withheld: for, if that which is one house in one sense, being under one roof, be divided by the structure into several flats constituting several houses in another sense, has one outer door to the street, of which a porter has the key and the sole control for the security of the tenants, each flat is a sufficient tenement, and the qualification is gained, although the tenant has no key to the outer door: and it is the same, although the porter resides on one of the flats, and is owner of all the others under the roof. Again, if the occupier is tenant, it seems to us immaterial to inquire whether he has an uncontrolled access to the house; for, if a house be let to A. without any access except over the yard of B., and B. neither gives nor refuses leave, and A. passes over the yard by sufferance, the mere liability to interruption in the access would not prevent his being qualified. Again, it seems immaterial to inquire whether the tenant of a house has exclusive possession, that is, if exclusive possession means exemption from servitudes or rights of entry reserved to the landlord. Such servitudes and rights of entry affect the value of the tenement, but not its sufficiency in kind.

Therefore we think that the true question in the cases cited, and in the present case, turns on the nature of the tenement occupied. Is it such property as the legislature intended to make a qualification? Now, the statute required some permanent occupation of, and some independent interest in, the property. The permanence prevents the sudden creation of *votes. The ownership or the tenancy, with [*45 rating, indicates some independence: in other words, the requirement of at least a tenancy excludes some occupations of less independence; such as the occupations of servants for their service; for example, porters of the lodge, gardeners of the dwelling in the garden; and also such as that of the surgeon for the hospital of the rooms therein (Dobson, app., Jones, resp., 5 M. & G. 112 (E. C. L. R. vol. 44), 8 Scott N. R. 80, 1 Lutw. Reg. Cas. 105); also the occupation of premises by objects of charity occupying under the permission of the trustees of the charity,—Davis, app., Waddington, resp., 7 M. & G. 37 (E. C. L. R. vol. 49), 8 Scott N. R. 807, 1 Lutw. Reg. Cas. 159; *Heartley v. Banks*, 5 C. B. N. S. 40 (E. C. L. R. vol. 94), 1 K. & G. 219.(a) These and the other cases of occupation inferior in right to a tenancy are excluded by the requirement that the occupier must be at least the tenant. But, if he is tenant, he occupies as tenant, and this part of the qualification is complete; and it is immaterial as to this under what denomination of tenant he is classed, whether as lodger, termor or lessee, or other name.

As to the kind of tenement which qualifies, the statute has described two classes of buildings, namely, those used for residential and those used for commercial purposes,—house, for residence,—warehouse, counting-house, shop, or other analogous building, for commerce.

(a) And see *Freeman*, app., *Gainsford*, resp., post, p. 68.

When the claim is in respect of a house, we consider that the legislature did not intend to create a part of a house used for residence, and not for commerce, a tenement sufficient to qualify.

A part of a house cannot truly be said to be a house, unless the word "house" is used in two senses. In Judson, app., Luckett, resp., 2 C. B. 98 (E. C. L. R. vol. 52), 1 Lutw. Reg. Cas. 490 (cited below more fully), a part of a house in one sense was in another sense a whole house, by reason of actual severance. Neither do we consider *46] *that the legislature, under the term "other building," meant to include a part of a house used for residence; for, the qualification of householder was frequently a qualification before the Reform Act; and in respect thereof it was always held that a lodger was not qualified as a householder. In Fludier v. Lombe, Cas. temp. Hardw. 307, a claimant was qualified to vote if he was a householder and the sole occupier of his house. One objection to the plaintiff's vote was, that he had let part of his house in lodgings, and so was not the sole occupier: but Lord Hardwicke ruled to the contrary; and he says,— "A lodger was never considered by any one as the occupier of a house; it is not the common understanding of the word; neither the house nor any part of it can be properly said to be in the tenure and occupation of the lodger." Since the Reform Act, the same opinion is conveyed in the decisions holding that occupation as a lodger did not qualify. The common meaning of "lodgings" is, a part of a house used for residence. If the legislature had intended to make lodgers qualified, we think it would not have been left to obscure conjecture from the words "other building."

In Wright, app., The Town Clerk of Stockport, app., 7 Scott N. R. 561; 5 M. & G. 33 (E. C. L. R. vol. 44), 1 Lutw. Reg. Cas. 32, the occupation of a separate room in a cotton-spinning factory was held to qualify, because each separate room was by reason of actual severance, with a separate outer door, an entire building in one sense, though part of the entire building (the factory) in another sense.

Then, assuming this to be the correct construction of the statute, the question here is brought to the point whether the rooms occupied by the appellant are a "house." We think that they were correctly *47] decided by the revising barrister not to be a house within the meaning of the statute, because they formed part of a house when they were let, and there was no actual severance of the appellant's part from the other part.

No authority earlier than Score, app., Huggett, resp., 7 M. & G. 95 (E. C. L. R. vol. 49), 8 Scott N. R. 919, 1 Lutw. Reg. Cas. 198, and Toms, app., Luckett, resp., 5 C. B. 23 (E. C. L. R. vol. 57), 2 Lutw. Reg. Cas. 19, was cited to show that a part of a house may become a "house," without any actual severance, by reason of some conventional arrangement in respect of the keys of the outer door, or the pernoctation of the landlord: and the authorities are uniform to show, that, by actual severance, a part of a house became changed into a house, and without such severance the change would not be effected.

In Kitchen on Courts 99, it is said: "If the inheritor of a house let a certain part in which he dwells, and severeth it from the other part, and maketh several doors to the high street, it is now as two houses: otherwise it is if they have but one door to the high street."

In *Monks v. Dykes*, 4 M. & W. 567,† Parke, B., says of the doctrine of Lord Coke that a chamber may be *domus mansionalis* in law, that it refers to a house divided into several chambers, with separate outer doors, and that neither in law nor in common sense can a man be said to be in possession of a dwelling-house, when he is a mere lodger. On the principle of actual severance, chambers of inns of court were held to be a dwelling-house, in *Evans and Finch's Case*, Cro. Car. 473. In *The King v. Great and Little Usworth*, 5 Ad. & E. 261 (E. C. L. R. vol. 31), 6 N. & M. 811 (E. C. L. R. vol. 36), the question was, whether each floor of that which was in one sense one house was in law a separate and distinct dwelling-house: it appeared that each floor had a separate staircase on the outside, and a separate outer door: and, on account of that actual severance, *the floor was decided to be a [48 separate and distinct dwelling-house: the house was the floor.

In *Judson, app., Luckett, resp.*, 2 C. B. 197 (E. C. L. R. vol. 52), 1 Lutw. Reg. Cas. 490, the claimant occupied the upper part of the house and the kitchen, having a distinct and separate entrance thereto. The landlord occupied the ground-floor, having a distinct and separate entrance thereto. The claim in the list was for part of a house. The judgment is, that the claimant was qualified, because a part of a house in one sense may be so completely separated from the residue as to constitute a house in another sense. The description "part of a house" might be true according to common understanding of the word "house," and yet may denote such a house in another sense as will qualify. In this judgment the qualification is made to turn on the actual severance.

The law relating to burglary is for the protection of human abodes during the hours of sleep: and a distinction is made for that purpose which has no analogy with qualification.

The general rule is, that a part of a house, in the common understanding of the word, does not become a house in law, unless there be actual severance. In *Leach's Crown Cases* 90, in the notes to *Roger's Case*, Lord Holt's opinion is reported thus:—"If inmates have several rooms in a house, of which rooms they keep the keys, and inhabit them severally, yet, if they enter into the house at one outer door with the owner, these rooms cannot be said to be the dwelling-houses of the inmates; but the indictment ought to be, for breaking the house of the owner." If the owner does not reside on the premises, the crime of feloniously breaking into the sleeping abode of a lodger in the night is precisely the same as it would be if the landlord slept there: and, in that case, it is held that the abode of the lodger may be called his *domus *mansionalis*. This exceptional rule, de- [49 pending on the reasons above assigned, is no ground whatever for holding lodgings to be a "house" within the meaning of a statute requiring the claimant of a vote to be the occupier of a house: and yet these exceptional cases were pressed on the Court in *Toms, app., Luckett, resp.*, 5 C. B. 23 (E. C. L. R. vol. 57), 2 Lutw. Reg. Cas. 19, as authorities for holding that lodgings became a "house," if the owner did not sleep on the premises.

For these reasons, and on these authorities, we hold that the qualification failed in respect of the subject of occupation.

Decision affirmed.

Kingdon, for the respondent, asked for the costs of the appeal. He submitted, that, inasmuch as there were at least two cases, viz., *Pitts*, app., *Smedley*, resp., 8 Scott N. R. 907, 7 M. & G. 85 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 168, and *Wansey*, app., *Perkins*, resp. (*Hill's Case*), 8 Scott N. R. 978, 7 M. & G. 151, 1 Lutw. Reg. Cas. 252,—expressly in point against him, the appellant ought to pay the penalty of his unsuccessful experiment.

PER CURIAM.—We think, that, under the circumstances, regard being had to the unsatisfactory state of the authorities upon the subject, the appellant was justified in taking the opinion of the Court upon his right to the franchise.

Costs refused.

*50]

*City of LONDON.

ALEXANDER BENNETT WILSON, Appellant; THOMAS ROBERTS, Respondent. *Nov. 15.*

The occupation of "offices," without any actual severance from the residue of the premises, does not confer a right to vote for a city or borough, under the 2 W. 4, c. 45, s. 27.

R. occupied "offices" in the city of London, comprising the whole of the first floor of the house (his residence being within the required distance), and was rated and assessed, and had paid all rates and taxes in respect of the premises. The landlord occupied the shop on the ground-floor of the house, and with his family resided on the upper floor thereof. There were two outer doors to the house,—one opening from the street into the shop, the other into a passage communicating with the staircase leading up to the first and upper floors. The door opening from the street into the passage had only one lock, of which R. and the landlord each had a key:—Held, that R. was not qualified to vote as tenant of a "house" within the 2 W. 4, c. 45, s. 27, the "subject of occupation" being a "part of a house," which part had not become by actual severance an entire house in any sense of the word.

At a court held for the revision of the list of voters for the city of London, Thomas Roberts, on the list of voters of the company of makers of playing-cards, duly objected to the name of Alexander Bennett Wilson being retained on the list in respect of offices at No. 32, Dowgate Hill, in the parish of St. Mary Bothaw. The facts of the case were as follows:—

Alexander Bennett Wilson (hereafter called the appellant) had for a period of more than twelve calendar months prior to the last day of July, 1861, been in the exclusive occupation, at a rent of 10*l.* a year, and upwards, of "offices" comprising the whole of the first-floor of the house No. 32, Dowgate Hill, aforesaid, and during all that time had resided at Charlton, being within the distance of seven miles of the city of London, and been rated to the relief of the poor, and been assessed to the assessed taxes, and had paid all rates and assessed taxes payable by him in respect of the said premises. His landlord occupied the shop on the ground-floor of the house, and resided with his family on the upper floor thereof. There were two outer doors to the said house,—one opening from the front street into the shop occupied by the landlord, and the other opening from the front street into a passage communicating with the staircase leading up to the first
*51] passage had only one lock; and both the appellant and the landlord had a key thereof and locked and unlocked this door and passed

through the same when and as they pleased; and the appellant had never been in any way controlled by his landlord in the use of this door. The only mode of access which the appellant had to the first floor in his occupation was through this door into the passage communicating with the common staircase: but there was also an inner door leading from the shop into the passage; and this was used exclusively by the landlord and his family.

The question was, whether, under the circumstances stated, the occupation and tenancy of the appellant were sufficient in point of law to entitle him to have his name inserted in the list of voters, in respect of the qualification described on such list.

The revising barrister held that they were not sufficient for that purpose, and expunged his name from the list of voters.

If the Court should be of opinion that that decision was erroneous, the name of the appellant was to be reinstated in the list of voters for the parish of St. Mary Bothaw.

Overend, Q. C. (with whom was *Fawcett*), for the appellant.—The question is whether the appellant is entitled to have his name inserted in the list of voters as the occupier of “offices.” He does not reside on the premises, so as to make him a lodger. He has the exclusive occupation of all the rooms on the first floor; he has the command of the outer door; and he is rated for the premises he so occupies. The case is not to be distinguished from *Wright, app.*, *The Town Clerk of Stockport, resp.*, 7 Scott N. R. 561, 5 M. & G. 33 (E. C. L. R. vol. 44), 1 Lutw. Reg. Cas. 32. There, a factory containing four *stories or floors was let off to a number of different persons for the purpose of cotton spinning: to each of these persons a distinct portion of the building, consisting of *one room*, was let at a distinct rent, varying from 10*l.* to 30*l.* per annum for each room, according to its dimensions: in these rooms each tenant had his own machines for spinning, which machines were worked by a power supplied by a steam-engine belonging to, and worked by and at the expense of the landlord, who also found the main gearing or shafting which communicated such power to the machines; it being part of the contract with each tenant that the landlord should so supply such power: each tenant had the exclusive use of his room, and had the key to the door thereof: the approach was in some instances a common staircase leading from the entrance to the factory, and upon which staircase the different doors to the rooms opened; in others, the rooms were approached by separate staircases from the ground outside the building; and in others by doors on the ground opening into the factory yard: and the Court, after time taken to consider, decided that each of these rooms so held was such a building as under the 2 W. 4, c. 45, s. 27, would confer a right of voting upon the occupier, and that each tenant had an exclusive occupation. Tindal, C. J., delivering the judgment of the Court, says: “We are of opinion that each of the rooms held in the manner described in the case was such a building as to confer the right of voting upon its occupier. It is called in the case ‘a room;’ it is described as a distinct or separate portion of the factory: each tenant is stated to have the exclusive use of his own room, and the key to the door thereof. And we think

such a description and such a mode of occupation brings it as much within the meaning of the word 'building' as is a shop or counting-house, which are expressly specified *in the Act." In Toms, *53] app., Lockett, resp., 5 C. B. 23, 34 (E. C. L. R. vol. 57), 2 Lutw. Reg. Cas. 19, Wilde, C. J., says: "The 27th section of the 2 W. 4, c. 45, enacts that every male person of full age, who shall occupy, as owner or tenant, 'any house, warehouse, counting-house, shop, or other building,' of the clear yearly value of not less than 10*l.*, shall, if duly registered according to the provisions thereafter contained, be entitled to vote in the election of a member to serve in parliament. What did the legislature intend to be comprised within those words? We all well know that the terms 'warehouse, counting-house, shop,' import parts of houses devoted to particular purposes of business; and the general words that follow, 'or other building,' must have been intended to embrace other separate occupations of distinct portions of a house. The object of the legislature, in introducing these words, seems to have been, to prevent the discussions that might be expected to arise out of the previous words." [WILLIAMS, J.—Is not a lodger a tenant?(a) He may be distrained on, even in the case of ready-furnished lodgings: *Newman v. Anderton*, 2 N. R. 224. The cases upon this subject seem to me to have been running in a wrong groove. Is not the question, whether the party is tenant of a house?] Almost anything will satisfy the word "house:" see *Nunn, app.*, *Denton, resp.*, 8 Scott N. R. 794, 7 M. & G. 66 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 178; *Daniel, app.*, *Coulsting, resp.*, 8 Scott N. R. 949, 7 M. & G. 122, 1 Lutw. Reg. Cas. 230: and see *Whitmore, app.*, *Wenlock (Town Clerk), resp.*, 7 Scott N. R. 489, 5 M. & G. 9 (E. C. L. R. vol. 44), 1 Lutw. Reg. Cas. 10. [WILLIAMS, J.—The position of a lodger is very fully considered by Lord Mansfield in *Lee v. Gansell*, Cowp. 1, where it was held that a bailiff in execution of mesne process may *54] break open the *door of a lodger's apartment, having first gained peaceable entrance at the outer door of the house.] That could hardly apply in the case of a holding such as this.

Underdown, who appeared for the respondent, stated that he was instructed to leave the case in the hands of the Court.

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the Court:(b)—

In this case the claimant occupied the first floor, being a part of a house, which part had not become by actual severance an entire house in any sense of the word: and we consider that the qualification fails, because the tenement, the subject of occupation, was not sufficient. It is not stated to be a shop, warehouse, or counting-house. It was not a house, because it was only a part of a house. It was not a building of a nature analogous to the others described in the statute, because it was only one part of a building, without any actual severance from the other parts.

We have assigned our reasons, and referred to the authorities on which we rely in support of this judgment, in the case of *Cook, app.*, *Humber, resp.*, *antè*, p. 33.

(a) *Cook, app.*, *Humber, resp.*, *antè*, p. 33, had not at this time been decided.

(b) The judges present at the argument were, Erle, C. J., Williams, J., Byles, J., and Keating, J.

This being our opinion upon the nature of the tenement occupied, it is immaterial to consider how the occupation of the claimant was affected by the uncontrolled access to the first floor, and by his absence all night from the premises. Decision affirmed.

*City of WESTMINSTER.

[*55

HENRY SMITH, Appellant; GEORGE HUGGETT, Respondent.
Nov. 11.

Notices of objection to a voter for the city of Westminster were sent to the overseers, *by post*, enclosed in one envelope, addressed "to the overseers of the parish of St. Anne, in the city of Westminster," pursuant to the 101st section of the 6 & 7 Vict. c. 18, and were duly received and published by them:—Held, that this was a sufficient service; and that the objector was not bound to show that he had complied with all the requirements as to posting in s. 100.

Quære, whether the provisions of s. 100 as to service of notices by post, apply to notices to overseers?

At a Court held for the revision of the list of voters for the city of Westminster, Henry Smith objected to the name of John Michael Allen being retained on the list of voters for the parish of St. Anne, Westminster. The name of John Michael Allen appeared on the list of persons claiming to vote, as follows:—

Allen, John Michael.	37, Wardour Street.	House.	37, Wardour Street.
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The facts of the case were as follows:—On the revising barrister calling upon the objector, in conformity with the 40th section of the 6 & 7 Vict. c. 18, to prove the service of his notice of objection on the overseers of the parish of St. Anne, it appeared that this notice was enclosed in the same cover with several others intended to be served by the objector in the same parish. The cover was addressed to "the overseers of the parish of St. Anne, in the city of Westminster;" and a parcel of notices thus made up was despatched by post: but the regulations prescribed by the 100th section of the above-mentioned statute for the posting of notices of objection were not followed; and no duplicate stamped by any postmaster according to the provisions of that section was produced before the revising barrister.

The notice of objection reached the overseers of the said parish of St. Anne,^(a) and was by them included in the published list of objections.

*It was contended that service of a notice of objection on overseers by post in the manner described, was sufficient to [*56 satisfy the provisions of the statute; and, if it were not sufficient, the effects of the irregularity were removed by the publication of the objection in the overseers' list.

On the first point, the revising barrister was of opinion that, if notices of objection were served on overseers by post at all, the mode

(a) It was *assumed* on the argument that the notice got to the hands of the overseers before the 25th of August, as the fact was.

of posting prescribed by the 100th section of the statute 6 & 7 Vict. c. 18, must be adopted; this mode of posting being by the 101st section made applicable to the service of notices on overseers; and that, consequently, service by post of a notice of objection on overseers could only be proved before the revising barrister by production of a duplicate stamped by a postmaster, in conformity with the regulations provided by the 100th section of the statute.

On the second point, the revising barrister was of opinion that it was not in the power of the overseers, by the publication of the objection, to remove the effects of any irregularity committed by the objector in the performance of any of the acts required from him by the statute.

The conclusion of the revising barrister on the case before him, therefore, was, that there had not been such a service of the notice of objection on the overseers as the Act of parliament demanded. Consequently, he retained the name of John Michael Allen on the list of voters for the city of Westminster: but, in view of the appeal to be brought before this Court, he called upon the said John Michael Allen to prove his qualification, which he failed through non-appearance to do.

The cases of one hundred and eighty-one other persons named in the list depending on the same decision, were consolidated with the principal case.

*57] *If the Court should be of opinion that the decision of the revising barrister was wrong, the name of John Michael Allen as well as those of the other persons above referred to were to be expunged from the register of voters for the city of Westminster: if they should hold the decision right, the names were to be retained upon the register.

Macnamara (with whom was the Hon. *R. Bourke*), for the appellants. —The decision come to by the revising barrister in this case was clearly wrong. The notices in question were well served: and, assuming that they were not, the revising barrister has found that they duly reached the hands of the overseers, and were duly acted upon by them. The revising barrister held the service to be insufficient, because the requirements of s. 100 of the 6 & 7 Vict. c. 18 had not been followed. The 17th section of the statute enacts "that every person whose name shall have been inserted in any list of voters for any city or borough may object to any other person as not having been entitled on the last day of July next preceding to have his name inserted in any list of voters for the same city or borough; and every person so objecting shall on or before the 25th of August in that year give or cause to be given a notice, according to the form numbered 10 in schedule B., or to the like effect, to the overseers who shall have made out the list in which the name of the person so objected to shall have been inserted," &c.: and s. 18 provides that the overseers shall make and publish a list of the persons so objected to. The person objected to is only interested in the publication of the objection: it is quite immaterial to him by what means the notice has come to the hands of the overseers: it is enough that it has reached them in due

*58] time. The 40th section provides, that, where the *objector appears to support the objection, and proves that he gave the notice

or notices respectively required by the Act to be given by him, the revising barrister shall call upon the person objected to to prove that he was entitled on the last day of July then next preceding to have his name inserted in the list of voters, in respect of the qualification described in such list. Then the 100th section, which prescribes the mode of transmitting notice by post, enacts that "it shall be sufficient in every case of notice to any person objected to in any list, &c., if the notice so required to be given as aforesaid shall on or before the 25th of August be sent by post, free of postage, &c., directed to the person to whom the same shall be sent, at his place of abode as described in the said list of voters; and, whenever any person shall be desirous of sending any such notice of objection by the post, he shall deliver the same, duly directed, open, and in duplicate, to the postmaster, &c.; and the postmaster shall compare the said notice and the duplicate, and on being satisfied that they are alike in their address and in their contents, shall forward one of them to its address by the post, and shall return the other to the party bringing the same, duly stamped with the stamp of the said post-office; and the production by the party who posted such notice of such stamped duplicate shall be evidence of the notice having been given to the person at the place mentioned in such duplicate on the day on which such notice would in the ordinary course of post have been delivered at such place." This section has no application to the service of the notice upon the overseers. That is dealt with by s. 101, which provides, "that whenever any notice is by this Act required to be given or sent to the overseers of any parish or township, it shall be sufficient if such notice shall be delivered to any one of such *overseers, or shall be left at his [*59 place of abode or at his office or other place for transacting parochial business, or shall be sent by the post, free of postage, or the postage thereof being first paid, addressed to the overseers of the particular parish or township, naming the parish or township, and the county, city, or borough respectively to which the notice to be so sent may relate, without adding any place of abode of such overseers." Thus, two modes are prescribed for sending notices to overseers,—one by delivering the document to any one of the overseers, or leaving it at his place of abode, or at his office or other place for transacting parochial business,—the other, by sending it by post addressed to "the overseers" of the particular parish, &c. [BYLES, J.—May not a service by the post be proved, where it has come to hand, without having recourse to the machinery provided by s. 100?] It is submitted that it may; and that it is quite immaterial how the document reaches the overseers, if it be proved to have actually reached them in due time. If the overseer be present, and produces the notice, and declares that he received it in due time, what more can be required? In *Bishop, app., Helps, resp.* 2 C. B. 45 (E. C. L. R. vol. 52), 1 *Lutw. Reg. Cas.* 353, it was held that sending a notice of objection to the party objected to, by the post, pursuant to the directions of the 6 & 7 Vict. c. 18, s. 100, is a sufficient substitute for giving the notice to the party, or leaving it at his place of abode, as required by s. 7; and therefore, where a notice was posted under s. 100, in sufficient time to reach the party, according to the ordinary course of post, on the 25th of August, it was held that such service was sufficient, notwithstanding

ing that the actual delivery was accidentally delayed until the 27th. In *Jones, app., Innous, resp.*, 17 C. B. 290 (E. C. L. R. vol. 84), a notice of objection to a county vote was addressed "to the overseers of the *60] parish or township of B.," without adding the county, as required by the 6 & 7 Vict. c. 18, s. 101: the notice, however having been found to have reached the hands of the overseers before the 25th of August, it was held that the notice and service were sufficient. And in *Godsell, app., Innous, resp.*, 17 C. B. 295 (E. C. L. R. vol. 84), the overseers having acted upon a similar notice, by inserting the name of the party in the list of persons objected to,—although it did not appear when it reached their hands,—the court again held the notice and service to be sufficient, saying, that, in the absence of any finding to the contrary, they would assume that the overseers had done their duty. In the analogous cases, which may be referred to, of motions to set aside proceedings for want of due service of process, it is not enough for the party to swear that he has not been served with the writ: he must state further that the copy left did not come to his possession or knowledge: *Phillips v. Ensell*, 1 C. M. & R. 374.†

David Keane (with whom was *Bridge*), for the respondent.—The decision of the revising barrister in this case was perfectly correct. The question presented for his decision, was, whether or not the process for bringing the party objected to to defend his right to be upon the register was properly served. That process is provided by the 17th section of the 6 & 7 Vict. c. 18, which requires the objector, amongst other things, on or before the 25th of August, to give or cause to be given to the overseers a notice of his objection to the vote of any particular person. A notice in the required form was in this case enclosed with others in an envelope, which envelope was addressed to "the overseers of the parish of St. Anne, in the city of Westminster." [ERLE, C. J.—And duly came to their hands.] The case so *61] finds: but none of the *directions for the transmitting of notices by post contained in the 100th section of the statute were followed. In many cases, the law has recognised the service of notices by post, as in the case of notice of dishonour of bills, for instance. But, with respect to these notices, the legislature has thought fit to superadd something to make the service effective: and those who choose to adopt the statutory mode of service must take care to follow all the requisitions of the statute. The legislature evidently intended that the time of service, where the notices are transmitted by post, should be placed beyond doubt, by making the post-office stamp the medium of proof, so as to have a reliable record of the transaction. It is no answer to say that the overseers have acknowledged the receipt of the notice, and have acted upon it by publishing the name of the party in the list of persons objected to. It may be that the legislature were desirous of putting it out of the power of the overseers to indulge their political feelings by making a partial selection of notices which have arrived too late.

THE COURT intimated, that, as the next case was substantially the same, they would hear the argument for the respondent in that, and then (if necessary) hear the appellant's counsel in reply upon both before pronouncing their opinion. See the next case.

*County of MIDDLESEX.

[*62

HENRY SMITH, Appellant; WILLIAM ALBERT JAMES,
Respondent. Nov. 15.

Notices of objection to a voter for the county of Middlesex were sent to the overseers, *by post*, enclosed in one envelope, addressed "to the overseers of the parish of Acton, in the county of Middlesex," pursuant to the 101st section of the 6 & 7 Vict. c. 18, and were duly received and published by them:—Held, that this was a sufficient service; and that the objector was not bound to show that he had complied with all the requirements as to posting in s. 100.

Quære, whether the provisions of s. 100 as to service of notices by post, apply to notices to overseers?

At a Court held at Brentford on the 28th of October, 1861, for the revision of the lists of voters for the county of Middlesex, John Anthony Cotes objected to the name of George Henry Hayward being retained on the list of voters for Brentford. The name of George Henry Hayward appeared on the list of persons claiming to vote, in the subjoined form:—

Hayward, George Henry.	Acton.	Copyhold land and building.	Church Field, Acton.
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The facts of the case were as follows:—On the objector being called upon, in conformity with the 40th section of the 6 & 7 Vict. c. 18, to prove the service of his notice of objection on the overseers of the parish of Acton, in the county of Middlesex, it appeared that his notice was enclosed in the same cover with several others intended to be served by the objector in the same parish. The cover was addressed "to the overseers of the parish of Acton, in the county of Middlesex;" and the parcel of notices thus made up was despatched by post: but the regulations prescribed by the 100th section of the above-mentioned statute for the posting of notices of objection were not followed; and no duplicate stamped by any postmaster according to the provisions of that section was produced before the revising barrister.

The notice of objection reached the overseers of the parish of Acton on or before the 25th of August, and was by them included in their published list of objections.

*It was contended that service of a notice of objection on overseers, by post, in the manner described, was sufficient to [*63 satisfy the 101st section of the statute; and that, if it were not sufficient, the effects of the irregularity were removed by the publication of the objection in the overseers' list.

On the first point, the revising barrister was of opinion, that, if notices of objection were served on overseers by post at all, the mode of posting prescribed by the 100th section of the 6 & 7 Vict. c. 18 must be adopted; this mode of posting being by the 101st section made applicable to the service of notices on overseers; and that, consequently, service by post of a notice of objection on overseers could only be proved before the revising barrister by production of a dupli-

cate stamped by a postmaster in conformity with the regulations provided by the 100th section of the statute.

On the second point, the revising barrister was of opinion that it was not in the power of the overseers, by the publication of the objection, to remove the effects of any irregularity committed by the objector in the performance of the acts required from him by the statute.

The conclusion of the revising barrister on the case before him, therefore, was, that there had not been such a service of the notice of objection on the overseers as the Act of parliament demanded. Consequently, he retained the name of George Henry Hayward on the list of voters for the county of Middlesex; but, in view of the appeal to be brought before this Court, he called upon the said George Henry Hayward to prove his qualification, which he failed through non-appearance to do.

The cases of four hundred and thirty-nine other persons named in the lists depending on the same decision, were consolidated with the principal case.

*64] *If the Court should be of opinion that the decision of the revising barrister was wrong, the name of George Henry Hayward as well as those of the other persons above referred to were to be expunged from the register of voters for the county of Middlesex: if they should hold the decision right, the names were to be retained upon the register.

Macnamara (with *Bourke*) appeared for the appellants.

Welsby, for the respondent.—The only difference between this and the last case is, that this is the case of a county vote. The 40th section of the 6 & 7 Vict. c. 18 not only requires the objector to prove that due notice of objection was given, but that *he* gave or caused it to be given. The mere admission of the overseer that he received the notice on the 25th of August is no proof that the objector gave the notice. [WILLIAMS, J.—He need not give the notice himself: he may do it by an agent; and the post office may be his agent for that purpose.] The statute has pointed out how a service through the post-office may be effected. Here the proof is attempted to be compounded of what was done at the post-office and the admission of the overseers. The latter, however, must be taken with the nature and the time and mode of the service. The service, it is submitted, is proved by what took place at the post-office: and, if this sort of service will suffice, all the machinery provided by the 100th section is idle and purposeless. The provision in s. 100 for sending notices to the overseers by post, evidently means to incorporate all the formalities prescribed for that mode of service by the 100th section. [WILLIAMS, J.—Your argument would deserve consideration, if the notices *65] had never reached the overseers.] See the *difficulty of this mode of proof. Several notices are enclosed in one envelope. It may be necessary to prove the time at which a particular notice was served: the overseer who received it has no recollection of the time when he received it: how, under such circumstances, could recourse be had to the envelope to ascertain the fact? (a) The whole

(a) There was another appeal from the county of Middlesex,—James, app., Smith, resp.,—in which the facts were the same as in these two cases, except that there each notice was in a separate envelope. It was taken to be disposed of by the decision in the others.

difficulty is got rid of by holding that the only evidence of the transmission by post shall be the stamped duplicate received from the postmaster under the provisions of the 100th section.

Macnamara was not called upon to reply.

ERLE, C. J.—I am of opinion that the conclusion arrived at by the revising barristers in these two cases of *Smith, app., Huggett, resp., and Smith, app., James, resp.*, was erroneous, and that the statute has been sufficiently complied with. The 17th section (a) of the statute requires the objector on or before the 25th of August to give or cause to be given a notice to the overseers. The evidence here is, that the objector placed the notices in an envelope addressed "to the overseers of the parish of St. Anne, in the city of Westminster," in the one case, and "to the overseers of the parish of Acton, in the county of Middlesex," in the other case, and that both envelopes so addressed, with their respective contents, came to the hands of the overseers in due time. If the objector had sent the notices by a private messenger, or had *delivered them with his own hand, there would have been [*66 no question. He did not adopt either of these courses, but sent them by the post. Now, for many purposes, the post may be considered as the agent of the party sending the notices. Having, therefore, sent the notices by his agent, the objector was bound to go on and show that his agent duly delivered them.(b) This he has done. The objection urged is, that, under s. 100, there is a specific provision for a statutory mode of proving the sending by post of the notices to which that section applies. That clause, however, is an enabling clause,—to facilitate the proof of service: it relieves the party sending the notice from the necessity of proving that it has reached its destination, provided the formalities prescribed thereby are duly complied with, viz., the delivery of the notice in duplicate to, and the comparison and stamping, &c., by the postmaster. In that case, the party who delivers the notices to the postmaster and receives from him the stamped duplicate is enabled by the production of that document before the revising barrister to prove that all has been done which the statute requires.(c) It, however, takes away none of the ordinary legal modes of effecting service. That being so, the argument founded upon the construction of the statute contended for on the part of the respondents, that, in respect of notices sent by post, the only mode of proving that they have reached their proper destination is, the production of the stamped duplicate received from the postmaster, entirely fails. There is nothing in the language of the section to warrant it; and it is clear to my mind that the legislature had no such intention. Where the 100th section does apply, the party desirous of serving *the notice has that facility afforded to him: but there is nothing [*67 in it to prevent him from pursuing the ordinary mode of service. The objector is required to prove that he has given his notices in due time: and here I think he has sufficiently done that. The decision must be reversed.

WILLIAMS, J.—I am entirely of the same opinion. It is quite unnecessary to say what our decision would have been, if it had not

(a) The 7th section, which relates to county voters, is to the same effect.

(b) See *Bishop, app., Helps, resp.*, 2 C. B. 45 (E. C. L. R. vol. 52), 1 Lutw. Reg. Cas. 353.

(c) See *Lewis, app., Roberts, resp.*, ante, p. 23.

been proved that the notices reached the hands of the overseers. But, as the notices did reach the overseers in due time, it is quite clear that the objector has complied with the statute. He has given or caused to be given the proper notice to the overseers within the time limited by the 7th section in the one case and the 17th section in the other.

BYLES, J.—I agree that the only question in these two cases is, whether the objector has within the meaning of the 7th and 17th sections of the 6 & 7 Vict. c. 18, given or caused to be given the proper notice to the overseers within the time prescribed by those sections respectively. The meaning of that provision is, that the party shall give the notice by himself or by an agent. In each of these cases, the objector gave the notice through the post-office: and I must confess I do not see why the postmaster-general should be the less the agent of the objector for this purpose because he is a public officer. It is unnecessary to say whether or not the provisions in s. 100 as to the service of notices by the post apply to the case of overseers.(a)

KEATING, J., concurred.

*68] *Macnamara* asked for costs of the appeals: but the Court refused to give them.(b) Appeal allowed, without costs.

(a) In *Bishop, app., Helps, resp.*, 2 C. B. 45 (E. C. L. R. vol. 52), 1 Lutw. Reg. Cas. 353, it was held that the provisions of s. 100 are equally applicable to notices to overseers, directed to their usual places of abode, as provided by s. 101.

(b) The rule has of late invariably been not to give costs to the appellant in any case. See *Scott's Costs*, 2d edit. 232, n., where the rule is stated with tolerable accuracy.

YORKSHIRE.—West Riding.

JOHN FREEMAN, Appellant; ROBERT JOHN GAINS福德, Respondent. Nov. 15.

A hospital was founded at Sheffield, under the will of Gilbert Earl of Shrewsbury, for twenty "poor persons who should give themselves to the service of God and to pray for the prosperity of the noble family of the founder and his posterity." The persons eligible as members or inmates were to be "poor indigent people, well esteemed of for godly life and conversation, of good conditions, peaceable and quiet amongst their neighbours, and such as by persons of honest repute should be judged fit objects of the charity." Each poor person on his or her election was placed in rooms, with certain allowances. They were prohibited from letting or assigning, or permitting any person to occupy the rooms jointly with them; and they were to be removable by the governing body if found guilty of certain irregularities:—Held,—upon the authority of *Heartley, app., Banks, resp.*, 5 C. B., N. S. 40 (E. C. L. R. vol. 94),—that the inmates had no such estate or interest in the rooms occupied by them as to entitle them to be registered as voters for the county.

At a Court held for the revision of the lists of voters for the west riding of Yorkshire, Jonathan Buxton objected to Thomas Betts as not having been entitled on the last day of July, 1861, to have his name inserted in the list of voters in the township of Sheffield, for the said west riding.

The name stood on the copy of the register relating to the said township, as follows:—

Christian and surname.	Place of abode.	Nature of qualification.	Place in township.
Betts, Thomas.	Shrewsbury Hospital, Sheffield.	Freehold house.	Shrewsbury Hospital, Self, occupier.

*Thomas Betts was a member of the hospital in the township of Sheffield founded by Gilbert, Earl of Shrewsbury, and was [*69 duly elected and appointed, and as such resided in separate chambers and rooms of the hospital, pursuant to his appointment, under the trusts and constitutions of the hospital, hereinafter set forth; which chambers and rooms are of the annual value of 40s. and upwards, and were in his bonâ fide occupation, and had been in his possession for six calendar months next previous to the last day of July, 1861.

By virtue of this, Thomas Betts claimed to have his name inserted and retained on the list of voters as entitled to vote for the west riding in respect of an equitable freehold estate in a house whereof he was seised for his own life, pursuant to the 18th section of the 2 W. 4, c. 45.

The hospital of Gilbert, Earl of Shrewsbury, situate in the said township, was founded under the following circumstances, and governed by the trusts and constitutions following:—

Gilbert, Earl of Shrewsbury, by his will, bearing date in May, 14 Jac. 1, devised to the executors thereof all his manors, lands, tenements, and hereditaments whereof he was seised of any estate of inheritance in fee simple, in possession, remainder, or reversion (with certain exceptions), to pay funeral expenses, debts, and legacies, and the residue and surplusage to his executors, their heirs, executors, and assigns. And he thereby willed and appointed an hospital to be founded at Sheffield for perpetual maintenance of twenty poor persons, and to be called "The Hospital of Gilbert, Earl of Shrewsbury," and the same to be endowed with such revenues and possessions as his executors should think fit, not being under 200*l.* a year.

This will was proved at London on the 14th of May, 1616.

*In the year 1625, the great-grandson of the above testator, [*70 whose name was Henry, Earl of Norwich, and afterwards Duke of Norfolk, for performing the will, erected a building as an hospital in Sheffield, and placed in it twenty poor persons, ten men and ten women; and, in the year 1673, made certain constitutions in writing for the government of the said hospital.

By these constitutions it was established, that, in the said hospital, there should be for ever one governor and twenty poor persons,—ten men and ten women,—who should give themselves to the service of God, and to pray for the prosperity of the noble family of the founder and his posterity; and that the governor and every of them should enjoy such chambers, rooms, and accommodations, from time to time, for their lives, together with such stipend and all other allowances as were thereafter to every of them limited and appointed, every one of them well and honestly behaving him or herself according to those statutes, constitutions, and ordinances. And, for better preventing of idleness, it was ordained that all such persons as were or should be

placed in the said hospital, as well men as women, should dispose themselves to some work and labour according to their abilities and health, that they might get somewhat towards their better maintenance, and might in some measure eat their own bread, and have wherewithal to help themselves in times of weakness or sickness. The men were also required to be widowers or bachelors, and the women widows or maids: and both to be three score years of age or upwards, unless dispensed with by the authority of the Earl Marshal of England. Their mode of election, in the case of death or removal, was to be by the governor and three assistants named in the constitutions, *71] or the major part of them, presenting the names *of two persons for every void place to the Earl Marshal or his heirs, together with a certificate of their place, condition, and behaviour; and to that end the said earl and his heirs might elect and appoint out of them one or more persons in the then vacant place or places; and, in the event of his neglecting to do so for six weeks after due notice, then the governor and his assistants should fill up the vacancies: and it was also provided that the Earl Marshal, or his heirs, might make choice of a person without certificate. The persons to be elected are to be poor indigent people, well esteemed of for godly life and conversation, of good conditions, peaceable, and quiet amongst their neighbours, and such as by persons of honest repute shall be judged fit objects for this charity; and, if it so happen by misinformation or mistake that any person or persons be elected wanting such qualifications, he shall marry afterwards, or in anywise behave themselves contrary to these rules and constitutions, he shall then be removed and expelled by the governor and assistants for the time being, or the major part of them, and another chosen in his place and room. If any of the said poor persons profanely or frequently curse or swear, or frequent any wine tavern or alehouse, or remain there above one hour in a day, or be drunk, or any otherwise misbehave themselves, the governor and his assistants are empowered to deduct from the offender's next week's allowance one half for the first offence, one whole week's allowance for the second offence, and two weeks' allowance for the third offence. If he be incorrigible, the governor shall take from him his gown and badge, and he shall be for ever expelled and removed out of the said hospital, provided that the said Earl Marshal or his heirs may according to their will and pleasure, by writing under his or their hand, restore any person so expelled. It *72] is also *ordained that none shall lodge with any of the poor persons in their room or rooms, or be admitted to inhabit there, upon any pretence whatsoever, unless license be first obtained under the hand of the said Earl Marshal or his heirs, or under the hands of the governor and assistants, or the major part of them; but they shall be helpful one to another according to their strength and ability as in charity they ought, provided that no person or persons be thereby hindered from helping any of the aforesaid poor persons in the daytime when occasion requires it; and that none of the said poor persons shall lodge abroad, wander, nor beg alms upon any pretence whatsoever, upon pain of expulsion. The constitutions having also pointed out the qualifications and duties of the governor of the hospital, and his salary having been named, and having pointed out the

office of his assistants, provide then that one or more of them shall monthly meet with the governor to pay the governor and poor persons of the said hospital their allowances respectively according to such proportions as thereafter limited and appointed, viz., to every man 2s. 6*d.* by the week, and to every woman the like sum of 2s. 6*d.* by the week, and to every one in due season two vanloads of pit-coals for one year's firing; and the assistants and governor are likewise to buy clothing, to every man and to every woman one purple gown in seven years, and a blue one every two years, to be clothed withal, on each of which gowns shall be worn a silver badge with the arms and crest of the family of the founder; and the governor to have every year a scarlet gown. The persons to be elected are to be taken or chosen out of the town or parish of Sheffield, if any person can therein be found fit; the poor tenants thereabouts of the said Earl Marshal and his heirs to have the preference before any other in such election, if duly qualified: if *there be no persons, then the said Earl Marshal is to make choice of any person qualified in any [*73 place or out of any other parish where the said Earl has any lands descended from the said Gilbert, Earl of Shrewsbury.

No member of the hospital has ever been expelled under the operation of the above constitutions.

The said Henry, Duke of Norfolk, by indenture dated 23d of November, 1806, granted, released, and conveyed certain lands and tenements in the counties of York and Derby, to trustees and their heirs, in trust that the said trustees should by or out of the yearly rents and profits of the said land and hereditaments maintain and keep the said house and building of the hospital, and the gardens and yards thereunto belonging, from time to time, for ever, as need or occasion should be, with all needful and requisite reparations, and should provide gowns and other provisions for the said governor and governess, and all the members and officers of or belonging to the said hospital for the time being, for ever, according to the said constitutions.

Power to appoint new trustees was created by the above deed, which power was exercised in the year 1693 by indenture; and by Act of parliament passed in the 11 G. 1 (c. xxxiii.), the trustees then surviving were declared to be seised of the trust lands to their use upon trust to apply the rents and profits and accumulations that had arisen in enlarging the buildings for accommodating additional members to be added to the hospital, and also in maintaining and keeping the house and building of the hospital, and the gardens and yard thereunto belonging, with good and decent order and repair.

It was also enacted that the governor of the hospital was to be a clergyman of the church of England, and elected, appointed, and displaced for any misfeasance or neglect of duty, in the same manner as the *governors of the said hospital are elected and displaced [*74 according to the said constitutions.

Under the powers of this Act of parliament, it was provided that the number of poor persons that should be added to the then existing number of poor persons members of the hospital should not be less than four men besides the governor and other poor men, and not less than four poor women besides the then present poor women; and that as many more should be added to the number from time to time as the

revenues of the hospital for the time being would extend to make provision for according to the constitutions made for the then existing members, so that a surplus of revenue be left sufficient to bear the expenses of the repairs and other necessary expenses relating to the hospital. And by this Act it was further provided that nothing in it should extend to take away or invalidate any powers belonging to the Duke of Norfolk and his heirs, as heirs of the founders of the hospital, which he might claim, use, or exercise by virtue of the constitutions of the hospital; and that the said duke and his heirs should for ever thereafter exercise such power, so as the execution thereof did not lessen the revenues of the hospital, nor the number of poor persons therein or to be therein.

The number of members of the hospital had become subsequently increased to thirty-six by the increase of the accumulated surplus revenues, until the year 1767, when a flood destroyed part of the hospital; and, from the destruction and the expense attending its restoration, the numbers were after that time reduced to twenty-seven, and the original constitutions were lost; in consequence of which circumstances another Act of parliament was passed in the 10 G. 3 (c. lviii.), for explaining and amending the last Act, and for enlarging the powers *75] contained in the *said Act, and for further purposes; and, for establishing the constitutions, a copy of the original was declared to be such as bound the hospital, and was made a schedule to the Act.

The powers for applying the accumulated revenues to the restoration of the hospital, and for restoring the number of its members, were thereby granted; and increased allowance given to the members, amounting in the whole to a weekly sum of 3s. 6d. apiece for each poor member of the hospital.

It was also stated that the amending and explaining the former Act might in many respects be highly beneficial to the charity, and be conformable to the original intentions of the founder of the hospital. The reservation of the powers of the Duke of Norfolk is therein repeated, so that their exercise did not lessen the revenues of the hospital.

The trust estates, including the land and hospital of Gilbert, Earl of Shrewsbury, have from time to time been conveyed and transferred to new trustees, in trust, under powers of the Acts of parliament in that behalf, for the said hospital, and according to the original constitutions; and, as the rents and revenues have increased in value, additions to the hospital and to the number of its members elected under the constitutions have been sanctioned and made by the Duke of Norfolk for the time being.

For the respondent it was contended that, on the authority of the case of Simpson, app., Wilkinson, resp., 8 Scott N. R. 814, 7 M. & G. 50 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 168, he had such an equitable estate of freehold for life in his chambers and rooms, the legal estate of which was vested in trustees of the hospital, as entitled him to vote and retain his name and qualification on the list of voters for the west riding of Yorkshire.

*76] For the appellant it was insisted that, on the *authority of the case of Heartley, app., Banks, resp., 5 C. B. N. S. 40, the re-

spondent was not the owner of an equitable freehold so as to confer a qualification to vote as claimed; but that his interest in his chambers and rooms in the hospital building was that of an occupier of part of the benefits of the charity, and a residence in the hospital, which did not make him the equitable freehold owner of a house and chambers, or justify the conclusion that it gave him a right to vote.

The revising barrister retained the name of the respondent on the register, on the ground contended for by him.

The names of thirteen other claimants, members of the same hospital, for the like qualification, were objected to for the same reason, and retained on the list on the same ground; and, notice of appeal in all the cases being given, the appeals were consolidated, and were to depend on this case.

"Statutes, constitutions, and ordinances made and established A. D. 1673, by The Right Hon. Henry Earl of Norwich, Earl Marshal of England, for the good government of the Hospitall at Sheffield, in the county of York, built by him in pursuance of and according to the will and charitable intention and direction of The Right Hon. Gilbert late Earl of Shrewsbury, deceased, great grandfather of the said Earl Marshal, as followeth:—

"It is ordained and established, that, in the said Hospitall, there shall be for ever one governour and twenty poor persons, ten men and ten women, who shall give themselves to the service of God, and to pray for the prosperity of the noble family of the founder and his posterity; and that the governour and every of them shall enjoy such chambers, rooms, and accommodations, from time to time, for their lives, together with such stipend and all other allowances as ^{are} hereafter to every of them limited and appointed; every one [*77 of them well and honestly behaving him or herself according to these statutes, constitutions, and ordinances:

"And, for the well government of the said Hospitall, the said Earl Marshal of England and his heires shall from time to time nominate and appoint a governour of the said Hospitall, who shall so continue for his life, unless the said earl or his heirs shall nominate and appoint any other governour to succeed therein; and that Thomas Chappell, gent., deputy-steward of the courts of the said Earl Marshal for the time being, Francis Ratcliff, gent., bailiff of the manor of Sheffield for the time being, John Eyre, collector of the rents, proffitts, and issues belonging to the said Hospitall for the time being, and their successors in the said employments (or such others as the said Earl Marshal of England or his heirs appoint), shall be hereafter assistants to the governour in disposall of the revenues of the said Hospitall in such sort as is hereafter appointed: which said governour shall yearly receive out of the revenues of the said Hospitall for his own maintenance 13*l*. of current moneys of England and four waine-loads of coals, and every of the said assistants 20*s*. yearly, for their care and services, which assistants are from time to time to help the governour as occasion requires, and particularly at such time and termes in the year when the receiver of the rents and proffitts of the Hospitall shall pay the same; and they are hereby appointed upon receipt thereof to see it laid up in the treasury house or other place in the said Hospitall from time to time as they shall receive the same; and one or more of

them shall monthly meet with the governour on the first Tuesday of every month, in the afternoon, in the hall of the said Hospitall, to pay the governour and poor persons of the said Hospitall their allowances *78] *respectively, according to such proportions as are hereafter limited and appointed, out of the moneys remaining in the said treasure house, to witt, to every man 2s. 6d. by the week, and to every woman the like sum of 2s. 6d. by the week, and to every one in due season two waine-loads of pitt-coals for one whole year's firing. The assistants aforesaid, shall also, from time to time, advise and assist the governour in buying such clothing, in such manner as shall be hereafter directed, to wit, to every man and to every woman one purple gown in seven years, for festival days, and a blew one every two years, to be cloathed withall; and the governour to have, every year, a new scarlett gown; upon each of which gowns shall be ever worn a silver badge with the arms or crest of the family of the founder:

"And it is further ordained that four ledger or register books shall be kept, that is to say, the governour shall keep one, and each of the three assistants one, wherein shall be entered and registered every member of the Hospitall, after the regular election of him or her, with the days and years of their several admittances; and, upon the death or removall of any of the said poor persons, there shall be an entrance made when the same doth happen, to the end and purpose that some other person or persons may be chosen and appointed in the place or places of such person or persons so deceased or removed; and there shall be likewise entered in the same books an inventory of all iron, brass, pewter, or any other moveable goods belonging to the said Hospitall as shall be at first bought in and from time to time bought and renewed; and they shall likewise enter from time to time in the same books what moneys shall be yearly received, and how the same hath been disbursed; and, at the end of every year (which shall be accompted to begin and end allways at the feast of the Annunciation of our Blessed *Lady the Virgin Mary), and, on due *79] examination of all receipts and disbursements, and the accompt perfected, the said governour and assistants shall set down at the foot of the said accompt what money remaineth then in the treasury, and subscribe their names thereunto:

"It is ordained that the governour for the time being shall be a man of an honest life and conversation, religious, grave, and discreet, and fitt to govern the said poor persons and look to the affairs of the said Hospitall, able to read, write, and cast up accounts, a single man, of forty years or upwards; and if, after his being placed in the said Hospitall or house, he shall marry, then his place to be void, ipso facto, unless it be dispensed withall by the said earl or his heirs by writing under their hand:

"It is ordained that there shall be twenty poor persons, ten men and ten women; the men widowers or batchelors, the women widows or maides; the men and women to be three score years of age or upwards, unless any of them shall be particularly dispensed withall by the said Earl Marshal of England or his heirs: and, for the electing of any of them, the governour and three assistants, or the major part of them, shall, upon the death or removall of every person or persons,

present the names of two persons for every void place to the said Earl Marshal or his heirs, together with a certificate of their place, condition, and behaviour, and to that end and purpose the said Earl or his heirs may elect and appoint out of them one or more person or persons in the then vacant place or places of the said Hospitall. But, if it so happen that the said Earl or his heirs neglect or fail to choose or appoint one or more within the space of six weeks after due notice given to him or them as aforesaid, that then the governour for the time being and the three assistants for the time *being, or the [80 major part of them, shall elect and fill up the vacancie or vacancies. Provided always, that the said Earl Marshal or his heirs shall, at their good will and pleasure, upon any vacancie or vacancies, when he or they shall think fit, make choice of any person or persons qualified according to these statutes, without certificate, to be a member or members of the said Hospitall:

“It is further ordained that the persons to be elected shall be taken or chose out of the town or parish of Sheffield, if any person can therein be found fitt: the poor tenants thereabouts of the said Earl Marshal and his heirs to have the preference before any other in such election, if duly qualified; but, if it so happen that there be no persons in the aforesaid town and parish capable of such place according to these statutes, then the aforesaid Earl Marshal or his heirs may make choice of any person or persons qualified according to these statutes in any place or out of any other parish where he the said Earl or his heires hath any lands, tenements, or hereditaments, disceded to him from Gilbert late Earl of Shrewsbury:

“The persons to be elected shall be poor indigent people, well esteemed of for godly life and conversation, of good conditions, peaceable and quiet amongst their neighbours, and such as by persons of honest repute shall be judged fitt objects of this charity: but, if it so happen, by misinformation or mistake, that any person or persons be elected wanting such qualifications as are in and by these statutes required, or shall afterwards marry, or in anywise behave themselves contrary to these rules and constitutions, that then every such person or persons so admitted shall be removed and expelled by the governour and assistants for the time being, or the major part of them, and *another chosen in the place and room of the person or persons [81 so displaced:

“And it is also ordained, for the better preventing of idleness, that all such person or persons as are or shall be placed in the said Hospitall, as well men as women, shall dispose themselves to some work and labour, according to their abilities and health, that they may gett somewhat towards their better maintenance, and may in some measure eat their own bread, and have wherewithal to help themselves in time of weakness or sickness:

“It is also ordained that none shall lodge with any of the poor persons in their roome or roomes, or be admitted to inhabitt there, upon any pretence whatsoever, unless licence be first obtained under the hand of the said Earl Marshal or his heires, or under the hands of the governour and assistants, or the major part of them; but they shall be helpfull one to another, according to their strength and ability, as in charity they ought. Provided that no person or persons be hereby

hindered from helping any of the aforesaid poor persons in the day-time, when occasion requires it; and that none of the said poor persons shall lodge abroad, wander, nor begg almes, upon any pretence whatsoever, upon pain of expulsion :

"It is also further ordained that the aforesaid scarlett gown and badge every year allowed unto the governour, upon his death or removal shall go to his successor; and that, in like manner, the respective gowns and badges of all the poor shall be delivered by the governour to such person and persons as shall from time to time succeed in their places; and that, in the year wherein they have no gowns, two shirts for every of the men and two smocks for every of *82] the women, shall be provided and delivered out of the *remaining yearly allowance appointed towards the maintenance of the Hospitall aforesaid :

"It is also ordained, that, if any of the said poor persons do prophainly or frequently curse or swear, or frequent any wine tavern or alehouse, or remain there above the space of one hour in a day, or be drunk, or any otherwise misbehave themselves, that then the said governour and assistants, or the major part of them, are hereby empowered to deduct from him or her, for the first offence, the half of their next week's allowance, which forfeiture shall be laid out in bread, and be divided equally amongst the residue of the poor in the said Hospitall; and for the second offence, one whole week's allowance; and for the third, two weeks' allowance, all to be disposed of as aforesaid; and so for every offence, after the like punishment, so often as the party shall offend. But, if it shall happen that the said person or persons so offending be incorrigible, and do not reform their lives, then the governour shall take from them their gowns and badges, and they shall be for ever expelled and amoved out of the said Hospitall; and the person or persons so expelled and amoved, with his or her several offences, shall be entered and registered in all the four aforesaid register books. Provided that, notwithstanding any such expulsion by the said governour and assistants, that the said Earl Marshal or his heirs may according to their will and pleasure, by writing under his or their hand, restore any person or persons so expelled as aforesaid :

"And it is further ordained and established, that, whatsoever sum or sums of money shall at the end of any year remain over and above the necessary disbursements herein and hereby appointed to be disbursed and laid out, shall be by the governour and assistants for the *83] time being put into the common treasury as *aforesaid; and, whensoever it shall be found that there remain in the said treasury, all necessary charges aforesaid being defrayed, and all charges of pen, ink, and paper, above the sum of 100^l, that then all such overplus money exceeding the sum of 100^l. aforesaid, shall be equally distributed amongst the poor persons in the said Hospitall according to the proportion of their allowance :

"And it is also ordained and established that whatsoever household stuff, utensils, or goods of any kind doth or shall of right belong to any room or roomes there, shall at the death of every poor person or persons be there left and remain for the use of his or her successor or successors; and the governour of the said Hospitall for the time being

is hereby required to see that nothing be removed, sold, or otherwise embezzled out of the rooms aforesaid but what is truly and properly their own, but that every year all the said goods be repaired and so kept and left in good order as he the said governour shall think fitt..

"And it is further ordained, that at all times when the service of Almighty God, prayers, or reading of the Holy Scriptures are performed, used, or read, either in the common hall or chappell of the said Hospitall by any person or persons thereunto appointed by the said Earl Marshal or his heirs, every person belonging to the said Hospitall, being a member of the same, may resort to the place or places when their health permitts, for the good of their soul, and to pray for themselves and the family of the honorable founder: And, when any of the said person or persons members of the said Hospitall shall die, the governour and assistants shall order and appoint that they have decent buriall, and that all the poor persons belonging to the said Hospitall who are able to go shall attend and follow the corpse of the *deceased party in their best gowns, two by two to the grave or [84 place of burial, behaving themselves soberly and gravely, as beseeemes so solemne an occasion:

"And it is further ordained, that the said Earl Marshal and his heirs, anything herein to the contrary notwithstanding, doth reserve a power to himself and his heirs for ever to alter, dispense, or repeale, at his or their wills and pleasures, any of these statutes, constitutions, and ordinances, and to add such new ones from time to time as he or they shall in his and their wisdom think fitt, for the better government of the said Hospitall: Provided always that neither the said Earl nor his heirs shall divert or diminish any part of the 200*l.* paid clear yearly revenue appointed for the maintenance of the said Hospitall:

"And it is also ordained, that these statutes, constitutions, and ordinances be hung up and placed in the common hall of the said Hospitall, and that the governour of the said Hospitall shall there read the same four times in the year, viz., upon the eve of Lady Day, Midsummer Day, Michaelmas Day, and Christmas Day, in the presence and hearing of all the poor persons belonging to the said Hospitall, that they may not pretend ignorance when they have committed offences, and that they may likewise know where to appeal, if they have been injured or unjustly dealt withall:

"Lastly, it is ordained, in case any controversie or difference shall arise amongst any of the poor persons, that the governour shall use his best endeavour to reconcile the same; and, in case of difficulty, to crave the aid of his assistants, and settle the same; and, if any of the said poor persons shall have any just cause of complaint against the governour or assistants, they may make their application by petition or otherwise to the said Earl Marshal or his heirs for relief therein."

**Pickering, Q. C.*, for the appellant.—The contention between the parties on this appeal is, whether the facts bring the case [85 within the principle laid down in *Simpson, app.*, *Wilkinson, resp.*, 8 *Scott N. R.* 814, 7 *M. & G.* 50 (*E. C. L. R.* vol. 49), 1 *Lutw. Reg. Cas.* 168, or within that of *Hartley, app.*, *Banks, resp.*, 5 *C. B. N. S.* 40. It is submitted that the inmates of this charitable foundation have no such interest in the rooms occupied by them as to entitle them to be

registered, but that their occupation is only subservient to the charity. The right of freeholders to vote for a county is based upon the statute 8 H. 6, c. 7, which, reciting that "the election of knights of shires to come to the parliaments of our lord the King in many counties of the realm of England have now of late been made by very great, outrageous, and excessive number of people dwelling within the same counties of the realm of England, of the which most part was of people of small substance and of no value, whereof every of them pretended a voice equivalent as to such elections to be made with the most worthy knights and esquires dwelling within the same counties," &c., provides, ordains, and establishes "that the knights of the shires to be chosen within the same realm of England to come to the parliaments of our lord the king hereafter to be holden, shall be chosen in every county of the realm of England by people dwelling and resident in the same counties, whereof every one of them shall have free land or tenement to the value of 40s. by the year at the least above all charges." There is no case precisely in point: but all the observations in the judgment of the Court in *Heartley, app., Banks, resp.*, apply with equal force here. The whole foundation of the party's claim to vote arises out of the eleemosynary character of the institution. His occupation is not that of owner. He cannot let or assign his *86] rooms, nor could he mortgage his interest in them: he cannot *even go out of them without forfeiting his claim to participate in the funds of the foundation. In *Simpson, app., Wilkinson, resp.*, there were no intervening trustees: the bedesmen were in the actual legal possession of the property. The ordinances here are altogether incompatible with the freehold being in these poor people. They are subject to arbitrary amotion for certain offences. The allotment of chambers and the general government of the inmates are very analogous to the statutes for the government of the military knights of Windsor, which are set out in *Heartley, app., Banks, resp.* In giving judgment in that case, Cockburn, C. J., says: "Whether the interest of these parties in the benefits of the charity be a freehold interest or not, we are of opinion that there is no such estate or interest in these houses as can properly be deemed an ownership. The legal estate is plainly in the dean and canons of Windsor; and, though they may be bound to allow the knights to occupy these houses, yet it appears that the dean and canons have power and authority to impose such restrictions on the enjoyment as to divest the occupation of the character of ownership. The knights cannot let their houses, in the whole or in part, nor even receive inmates or guests therein, except with the assent and sanction of the dean and canons. The language, too, of the grant, and of the statutes of the institution, speaks of the houses or rooms of the knights (for both terms are used) in language inconsistent with the idea of ownership. Their residences are termed rooms or lodgings; and in one place the occupation is termed a 'commodity.' The knights are placed under the control and authority of the dean and canons, and are moreover subjected to a number of minute regulations which show that this institution is altogether of an eleemosynary *87] character, and that the occupation of their residences *was subordinate to the general objects and purposes of the charity." It is impossible to distinguish that case from the present.

Hannen, for the respondent.—The sole question is, whether or not the occupiers of rooms in this hospital have an equitable freehold. Their appointment is for life: and they can only be removed for certain offences. If they take a freehold interest, the fact of this being a charitable foundation does not prevent the parties from acquiring the franchise: the disqualification by reason of the receipt of alms imposed by the 36th section of the 2 W. 4, c. 45.(a), applies only to borough voters. The legislature may have had good reasons for making that distinction between borough and county voters. [WILLIAMS, J.—I perceive that my late Brother Maule, in the course of the argument in *Simpson*, app., *Wilkinson*, resp., says: "It would be singular if the very thing that gives these parties their qualification should be held to disqualify them."] The same learned judge, in giving judgment, says: "These bedesmen are not, like the claimants in the last case,"—*Davis*, app., *Waddington*, resp., 8 Scott N. R. 807, 7 M. & G. 37 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 159,—"liable to arbitrary amotion, and therefore they have such an estate as to entitle them to vote." [WILLIAMS, J.—You must make out that these parties could sustain a bill in equity to compel the governor and assistants to put them in possession of the *particular rooms.] When once they [*88 have been assigned to them. The whole constitution of the order of military knights of Windsor was elaborately discussed in the House of Lords, in *The Attorney-General v. The Dean and Canons of Windsor*, 30 Law J., Ch. 529, where it was held that the lands, and consequently the increased rents, were vested in the dean and canons, and that the poor knights were not to be considered as cestuis que trust. *Heartley*, app., *Banks*, resp., therefore, will not govern the decision of this case; but *Simpson*, app., *Wilkinson*, resp., must. The facts of that case were these:—*Burleigh Hospital* is a freehold building, divided into rooms, each of which is of the annual value of 4*l.*, and is separately inhabited by a "bedesman," appointed under certain rules. Each bedesman keeps the key of his own room, and the successor of each deceased bedesman occupies the same room as did his predecessor. No charter, deed, or other document relating to the foundation could be discovered. The ordinances referred to certain feoffees and their heirs, but none were known. By these rules, which bore date the 20th of August, 1597, it was amongst other things provided that none was to be admitted who was leprous, a drunkard, adulterer, &c., and that any one so afflicted, or guilty of any of the offences specified, should be displaced; but there was no instance on record of a bedesman having ever been displaced. The bedesmen having claimed to be entitled to vote for the county in respect of their several interests, the revising barrister decided that a legal foundation might be presumed, not necessarily investing the claimants with a corporate character, and that they were respectively entitled to a separate freehold estate in their rooms respectively. And the Court held that his conclusion was right in point of law, and warranted by the facts.

(a) "No person shall be entitled to be registered in any year as a voter in the election of a member or members to serve in any future parliament for any city or borough who shall within twelve calendar months next previous to the last day of July in such year have received parochial relief or other alms which by the law of parliament now disqualify from voting in the election of members to serve in parliament."

[WILLIAMS, J.—The difficulty I feel is this. Looking at the whole *89] *of the constitutions, it appears that the trustees are to keep the premises in repair, and are to appoint the residences and stipends to the inmates. That does not give the recipients of the charity the freehold. Suppose the trustees chose to alter the residence, who would have a right to object?] None of the rules are inconsistent with the appointees taking an estate for life. A lease for life or years, with a condition that the lessee shall not grant over his estate, or let the land to any other person, is good: Co. Litt. 204 a, 223 b; Cruise Dig. Vol. 2, p. 7, s. 34. So, "where a man makes a lease to a woman quamdiu casta vixerit; or, where a man makes a lease for life to a widow, si tamdiu in purâ viduitate vixerit:" Cruise, Dig. Vol. 2, p. 37, s. 65. Again, in Cruise, Dig. Vol. 1, p. 102, s. 7, it is said that, "if an estate be given to a woman dum sola fuerit, or durante viduitate, or to a man and woman during coverture, or as long as the grantee shall dwell in a particular house; in all these cases the grantees have estates for life, determinable upon the happening of these events." Here, a set of apartments is assigned to each inmate on his or her election: and the appointment, being without any limit as to duration, must necessarily be an appointment for life.

Pickering, in reply.—The occupation of the rooms by these poor persons is purely and strictly of an eleemosynary character. They could have no right, by bill in equity or otherwise, to insist upon retaining possession of the particular rooms allotted to them on their first election. *Heartley*, app., *Banks*, resp., is precisely in point.

ERLE, C. J.—I am of opinion that the claimant did not take an equitable freehold in the chambers in the hospital wherein he resided, *90] so as to entitle him to vote *under the 8 H. 6, c. 7, and consequently that the decision of the revising barrister must be reversed. It appears from the statements in the case, that Shrewsbury Hospital was founded under the will of Gilbert Earl of Shrewsbury: and, by the constitutions which are before us, it appears that the persons to be elected members or inmates thereof are to be "poor persons who shall give themselves to the service of God and to pray for the prosperity of the noble family of the founder and his posterity." They are to be "poor indigent people, well esteemed of for godly life and conversation, of good conditions, peaceable and quiet amongst their neighbours, and such as by persons of honest repute shall be judged fit objects of this charity." All the other regulations or constitutions are entirely consistent with that. It appears that in practice each of these poor persons upon his election is placed in a set of chambers, and probably continues therein from the time of his election until he dies: but the question is not as to the time of occupation, but what are his rights when placed there. It seems to me that he is elected as a mere object of charity; and that, when the governor assigns him rooms for his residence, he does not confer upon him any estate which he could enforce by bill in equity. It would obviously be contrary to the intention of the ordinances that each of these poor persons should have power to file a bill as if the legal estate was vested in him or her. I also think it would be quite contrary to the intention of the statutes relating to the qualification of voters, by which it is provided that none shall vote in the election of knights of

the shire but those who are resident within the county having freehold land or tenement to the value of 40s. by the year at least above all charges. These are the general observations which lead me to the case of *Heartley, app., Banks, resp.*, 5 C. B. N. S. *40 (E. C. L. [*91 R. vol. 94), and I pronounce this decision with the more confidence because I think that case is precisely in point. And the reasons there given to show that the recipients of that charity had no equitable freeholds are equally applicable here; there being, in my judgment, no distinction in this respect between a claim of qualification to vote for a borough and for a county. Doubtless the 36th section of the Reform Act, which excludes the recipients of parish relief or alms from the right of voting, does not expressly apply to county voters. But, for the present purpose, the judgment in the case last referred to, holding that the regulations to which the inmates were subjected showed the institution to be altogether of an eleemosynary character, and the occupation of the residences by them subordinate to the general objects and purposes of the charity, so as to prevent their taking a freehold interest, is just as applicable to the case of a county as to that of a borough voter. I do not accede to the suggestion that the Court is put to its election between the case of *Simpson, app., Wilkinson, resp.*, and that of *Heartley, app., Banks, resp.* The question submitted for the opinion of the Court in the former case was not whether the claimants had an equitable freehold in the rooms allotted to them, but whether the revising barrister was right in holding that a legal foundation might be presumed, not necessarily investing the claimants with a corporate character. And the judgment of the Court was confined to that. That which is represented to have been said by Maule, J., if correctly reported, was clearly extrajudicial. But, be that as it may, the adjudication was upon the other point only. The decision of the revising barrister must be reversed.

WILLIAMS, J.—I am entirely of the same opinion. *The [*92 occupier of a residence as part of the benefits of a charitable institution is not entitled to an estate of freehold therein, unless the founder has expressly assigned it to him directly or indirectly during his life. Mr. *Hannen*, on behalf of the respondent, has contended that there is such a direction here. I cannot, however, adopt his construction. He relies upon the first provision of the statutes or constitutions of the hospital, which states that the governor and each of the other inmates shall enjoy their rooms for their lives, together with such stipend and allowances as thereafter limited. I assume that there is sufficient to show that the claimant would have a freehold interest in the rooms allotted to him if he had any property in them. But the question is whether he has *any property*. I am of opinion that he has none. The language of the constitutions simply is, that the accommodation provided for the recipients of the charity shall be regulated in a certain way. They are to take for their lives, subject to removal for any of the offences specified. But it does not therefore follow that the particular rooms are to be assigned to each of them *as owner* for his life. It seems to me to be clear that he has not the right of an equitable owner at all. If he had, although the purposes of the charity might require him to be removed to another set of rooms, he might set the governor at defiance. It is quite manifest that no such

state of things as that could have been intended. It is simply the case of a number of persons placed on a charitable foundation, who by the regulations of the charity are entitled to be properly and reasonably accommodated with chambers to live in and other allowances. Having a right to be so supplied does not constitute them equitable owners of the rooms in which they are placed.

*93] BYLES, J.—I am of the same opinion. This case in *reality* turns upon the construction of the statute of 8 H. 6, c. 7; for, the Reform Act cuts down and does not extend the right of voting in respect of freehold qualifications. Now the 8 H. 6, c. 7, recites that “the elections of knights of shires to come to the parliaments of our lord the King in many counties of the realm of England have now of late been made by very great, outrageous, and excessive number of people dwelling within the same counties of the realm of England, of the which most part was of people of small substance and of no value, whereof every of them pretended a voice equivalent as to such elections to be made with the most worthy knights and esquires dwelling within the same counties,” &c.; and then it provides “that the knights of the shires to be chosen within the same realm of England to come to the parliaments of our lord the King hereafter to be holden, shall be chosen in every county of the realm of England by people dwelling and resident in the same counties, whereof every one of them shall have free land or tenement to the value of 40s. by the year at the least above all charges.” The persons entitled to vote must be independent freeholders. The inmates of this hospital have scarcely one of the indicia of property. They must accept such rooms as the governor may choose to assign to them: they cannot assign, or let, or occupy them jointly with any one else; they are not extendible on an elegit; and they may at any time be changed. It is even doubtful whether they have such a possession of their rooms as would enable them to maintain trespass against any person intruding upon them. The true nature of their occupation is only eleemosynary. The inmates are described as “poor indigent people,” and as “fit objects for this charity.” They clearly are not freeholders within the 8 H. 6, c. 7. It is said that this decision will conflict with that of *Simpson, app.*, *94] *Wilkinson, resp.* But that case is no authority here, because the point submitted to the Court and decided by them was not the point raised here. I agree, however, that *Heartley, app.*, *Banks, resp.*, was a well-considered decision, and in complete accordance with the words and the intention of the statute of 8 H. 6, and precisely applicable to this case.

KEATING, J.—I concur with the rest of the Court in thinking that the decision of the revising barrister in this case should be reversed; for, we could not possibly sustain that decision without overturning the case of *Heartley, app.*, *Banks, resp.*, which was decided after much consideration. The military knights there certainly did not assume so decidedly eleemosynary a character as the recipients of the charity do here. It is impossible to conceive a reception of charity under rules more stringent than those of this hospital, or more entirely inconsistent with a freehold interest. The governing body may assign to each inmate any particular set of rooms, and may change them at pleasure. There is nothing, therefore, in which it can be said that

the party has a freehold interest. All he has, is, a right to participate in the benefits of the charity so long as he conforms to its statutes and ordinances. Though that may be in point of law an appointment for life, there is no appointment to any particular set of rooms. The decision, therefore, of the revising barrister cannot be sustained.

Decision reversed.(a)

(a) See *Heath, app., Haynes, resp.*, 3 C. B. N. S. 389 (E. C. L. R. vol. 91).

*Borough of DEVONPORT.

[*95

JAMES WEBB CURTIS, Appellant; WALTER SEYMOUR
BLIGHT, Respondent. Nov. 19.

An objector is bound in his notice to describe himself as of his true place of abode; and, if he has at the time of signing the notice *bonâ fide* two places of abode, he may state either.

For two years prior to February, 1861, A. resided in the house of his mother at 25 C. Street, it having been verbally agreed between them that he should occupy the house as tenant at will, paying no rent, and that she should live with him. Much of the furniture in the house belonged to A. In February, 1861, A. removed with his wife to 94 F. Street, where he continued down to the time of the revision to carry on the business of a licensed victualler; and it was necessary for the conduct of the business that he and his wife should live and sleep at 94 F. Street, and they did in fact live and sleep there from February, 1861, downwards without any interruption, save that they slept at C. Street one night, and that C. himself slept there ten nights; but they were both living and sleeping at 94 F. Street on the 23d of August when A. signed a notice of objection. A. had done nothing to prevent him from returning to live in C. Street, and he intended to return to live there whenever it should suit his convenience:—

Held, that the revising barrister was warranted in finding that in point of *fact* C. Street was not the true place of abode of A., and that the notice of objection was consequently insufficient.

A notice of objection is not vitiated by the address of the objector being added by a third person by his direction.

At a Court held for the revision of the list of voters for the parish of Stoke Damerel, in the borough of Devonport, James Webb Curtis objected to the names of Walter Seymour Blight and several other persons being retained on the borough list.

The notices of objection both to the overseers and to the party purported to be signed thus,—“James Webb Curtis, of 25, Clowance Street, on the list of voters for the parish of Stoke Damerel.” The total number of cases affected by these notices was two hundred and two.

The notices, which were in all other respects good, were impeached on two grounds,—first, that the place of abode of the objector had been inserted after the objector had signed the notices,—secondly, that the objector's place of abode was not properly stated in the notices.

The facts were as follows:—It is the practice of the overseers of the parish of Stoke Damerel, in making out the list of voters, to divide it into six wards, being the wards into which the parish is divided for municipal purposes. The name of the objector (the *appellant) appeared twice on the list,—first, in St. Aubyn Ward (which is the second ward in order), his name stood thus,—

[*96

Curtis, James Webb.	94, Fore Street.	House. House.	25, Clowance Street. 94, Fore Street.
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Secondly, in Clowance Ward (which is the fourth ward in order), his name stood thus,—

Curtis, James Webb.	25, Clowance Street.	House.	25, Clowance Street.
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Throughout the list, whenever the voter's qualification is supposed to consist of two houses occupied in succession, the words "in succession" are not inserted, but the word "house" is inserted twice in the third column, and the description of the two houses is inserted in the fourth column in the order of their occupation.

The notices, which were in the ordinary printed form, were prepared in the office of a solicitor, and were properly filled in with the name of the person objected to, the date, and the like, before the objector signed them; but a blank was left for the objector's signature and place of abode. The appellant signed all the notices with his own hand on the 23d of August, 1861, but he did not add any place of abode: but immediately after he had signed them, the words "25 Clowance Street" were written after his signature by the clerks who had previously filled in the other written parts. In some cases, this was done in his presence; in all cases, on the same day. The appellant gave no directions for the insertion of any particular place of abode: but he knew that as fast as he signed the clerks added the description "25, Clowance Street" as his place of abode.

*97] *It was contended that the notices were bad because the place of abode was added after the appellant had signed, and without any express direction from him.

The revising barrister was of opinion that this did not invalidate the notices: and he decided, that, inasmuch as the addition was known to and sanctioned by the objector, the notices were in this respect good.

It was then contended that the notices were bad because 25 Clowance Street was not the appellant's place of abode. Upon this point the facts were as follows:—

For about two years before February, 1861, the appellant occupied and lived in 25, Clowance Street. The house belonged to his mother, but much of the furniture belonged to him; and it had been verbally agreed between the appellant and his mother that he should occupy the house as her tenant at will, paying no rent, and that she should live with him. In February, 1861, the appellant (who until Christmas, 1860, had been a clerk in a solicitor's office) removed to 94, Fore Street; and there the appellant carried on the business of a licensed victualler until the time of holding this Court, the 12th of October, 1861. During all this time, the appellant had no other occupation; and it was necessary for the conduct of the business that he and his wife should live and sleep at 94, Fore Street.

They did live and sleep there from February, 1861, until the 12th

of October, 1861, without any interruption, save this, that the appellant and his wife slept at 25, Clowance Street, one night, and that the appellant himself slept there ten nights. The appellant and his wife were living at and slept at 94, Fore Street, on the 23d of August, 1861. The appellant, however, continued the occupation of 25, Clowance Street, and he did nothing to prevent him from returning to live there, and he intended to return and live there *whenever it should suit his convenience: and about the 1st of October, 1861, [*98 he entered into an arrangement (which has not yet been carried into effect) to discontinue the business carried on at 94, Fore Street, and give up the occupation of the premises.

After the appellant removed to 94, Fore Street, his mother had no other permanent home than 25, Clowance Street; and she occasionally resided there: and, whilst she so resided, the appellant kept a woman servant to attend on her: but, between February and October, the mother frequently lived elsewhere, sometimes with the appellant at 94, Fore Street, sometimes with a daughter at Kingsbridge, which is fifteen miles from Devonport: and, during the mother's absence from 25, Clowance Street, no servant was kept; so that it frequently happened that the house, 25, Clowance Street, was left for two or three weeks at a time without any one living in it: and no servant was kept there during the months of July, August, and September.

Upon these facts, it was contended by the respondents, that 94, Fore Street, and not 25, Clowance Street, was, on the 23d of August, 1861, the appellant's true place of abode; that he could not for this purpose have two places of abode; and that the notices were therefore bad.

It was contended by the appellant,—first, that the place of abode was rightly stated, inasmuch as 25 Clowance Street was the place of abode stated in the list of voters for Clowance Ward,—secondly, that the appellant had two places of abode, *i. e.* 25, Clowance Street, his permanent home, and 94, Fore Street, his temporary residence.

The revising barrister was of opinion that the appellant was required to state his true place of abode at the time when he signed the notices; that, if he really *had two *bonâ fide* places of abode, [*99 he might state either: but he thought it was not sufficient to prove a mere legal residence at 25, Clowance Street: and he was of opinion, that, under the circumstances above stated, 25 Clowance Street had for the time ceased to be the appellant's place of abode, and that 94 Fore Street was for the time his only true place of abode.

The revising barrister, therefore, decided that the notices were bad, and retained on the list the names of the persons objected to: but he offered to allow them to prove their respective qualifications, which some of them did; but the respondents whose names were set forth in the schedule annexed to the case (one hundred and sixteen in number) failed or declined to do so.

The whole of the cases depending upon the same decision were consolidated.

If the Court should be of opinion that the notices of objection were invalid for either of the reasons insisted on by the respondents, the register was to remain without amendment; but, if the Court should be of opinion that the appellant was properly described as of 25 Clow-

ance Street, and that the notices were not invalid by reason of the addition of the place of abode after the appellant had signed them, the names of the persons set forth in the schedule were to be expunged from the register.

Lush, Q. C. (with whom was *Bullar*), for the appellant.—The conclusion arrived at by the revising barrister was wrong. It is only by the form (Sched. B. No. 10) referred to in s. 17 of the 6 & 7 Vict. c. 18, that the objector is required to state in the notice of objection his place of abode; and that requirement is satisfied here. The objector is described on the list of voters as of 25, Clowance Street; and no *100] person could *be misled: and, although during the month of August, when the notice was signed and forwarded, he was actually residing at 94, Fore Street, and his description as of that place would have been a correct description, still, being in the occupation of the other place also, he might well be described as of that place. There is nothing to prevent a man having two residences either of which he may occupy at his pleasure. All that the statute requires, is, that there shall be such a description of the person objecting as to insure his identification: and one place of abode is sufficient for that purpose. It has been held, under the County Court Act, that a man having two *bonâ fide* and permanent places of abode, may avail himself of either to bring himself within the concurrent jurisdiction clause: see *Macdougall v. Paterson*, 11 C. B. 755 (E. C. L. R. vol. 73); *Butler v. Ablewhite*, 7 C. B. N. S. 640 (E. C. L. R. vol. 97). As to the other point,—the circumstance of the place of abode having been added by a third person after the signature of the objector had been put to the notices, clearly did not vitiate the document:

Kinglake, Serjt. (with whom was *Lopez*), for the respondent.—The first objection was founded upon *Toms*, app., *Cuming*, resp., 8 Scott N. R. 910, 7 M. & G. 88 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 200, where it was held that the signature to the notice,—and, as it is submitted, the whole signature, including the address,—must be the personal act of the objector, and cannot be deputed to a third party. The other, however, is the material point. As to that, the contention on the other side is, that a mere constructive legal occupation is enough to constitute a place of abode. It is clear from the statements in the case that this person was not residing at 25, Clowance Street, at the time he signed the notices. The statute requires his abiding place, *101] not his place of *residence; though it may well be questioned whether 25, Clowance Street was for any purpose the residence of the objector. He resided with his wife at 94, Fore Street, where he carried on his business, and where, as the case states, it was necessary for the conduct of the business that he and his wife should live and sleep. This question was argued at considerable length in a case of *Knowles*, app., *Brooking*, resp., 2 C. B. 228 (E. C. L. R. vol. 52), 1 Lutw. Reg. Cas. 461, where it was held by *Tindal*, C. J., and *Erle*, J.,—dissentiente *Maule*, J.,—that the *true* place of abode must be stated in the notice. *Erle*, J., there says,—2 C. B. 538,—“I cannot discover any good effect from requiring the place of abode as described in the list, instead of the true place. If communication is contemplated, the true place is the best. If the name occurs only once, the identity is clear, without referring to place. If the name occurs twice,

the objector is identified at the revision, which is as early as can be useful, if no communication is intended. If pretended objectors are to be guarded against, there would be no security from requiring the place to be transcribed." The question again came before the court in Melbourne, app., Greenfield, resp., 7 C. B. N. S. 1 (E. C. L. R. vol. 97), where it was held that the "place of abode" of the objector under the 7th section (it being the case of a county vote) of the 6 & 7 Vict. c. 18, means that which is his actual place of abode at the time of signing the notice, and not that described in the register. Erle, C. J., there says: "I am at a loss to see how it can be said that the legislature meant by the words 'place of abode' either the place of abode described in the register, or the true place of abode, at the option of the party. I think that, it having been decided in Knowles, app., Brooking, resp., that the insertion in the notice of the present place of abode of the objector is a compliance with the act, I should be conflicting *with that decision if I held that the insertion [*102 of the past place of abode would also be a compliance with the act. It would be giving an unreasonable construction to the statute to hold that the objector has the option of using either his present or his late place of abode. At all events, that being a matter which has been decided on great deliberation, I adhere to it." And the other members of the Court unanimously agreed that Knowles, app., Brooking, resp., was decisive of the question. [BYLES, J.—You assume that a man cannot have two places of abode. Suppose a man has two residences, at each of which he passes six months of the year, has he no place of abode?] For the purposes of this act, his place of abode would be the place at which he actually resided at the time of signing the notice. In Whithorn, app., Thomas, resp., 8 Scott, N. R. 783, 7 M. & G. 1 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 125, A., a freeman of the borough of T., resided with his wife and family and carried on his business of wine merchant at G., more than seven miles from T.: he paid 9*l.* a week for the use of a bedroom and a dark closet in the house of a friend at T., keeping the key of the closet, in which he deposited wine samples: he slept in the bedroom twelve times in the six months next before the 31st of July: and it was held that he did not reside in T. for six months before the 31st of July, within the meaning of the 2 W. 4, c. 45, s. 27. In Kerr v. Haynes, 29 Law J., Q. B. 70, three years before action brought the plaintiff hired a house at Margate, and from that time had his wife, family, and servants permanently established there, he and his family occupying that house as their dwelling and home. He at the same time carried on business as a law-stationer in London, and occupied three houses there. He was in the habit of passing three or four days of each week in London, occupying two rooms in one of the houses, which *rooms had been fitted up for his residence while staying in town. He [*103 always absented himself from London and resided with his family at Margate whenever his business would allow. In the winter and early spring he was usually in London four days in each week; during the rest of the year he was usually in Margate three and occasionally four days in the week. On the day upon which the action was brought he was in London: but, when the writ was issued, he was on his way to Margate. At the trial, the jury found a verdict for the plaintiff

with 12*l.* damages: and it was held that the plaintiff dwelt at Margate, and not in London, and therefore that he was entitled to his costs of the action. Cockburn, C. J., delivering the judgment of the Court, there says: "It is unnecessary to consider whether a man may not have two dwelling-places at the same time, or to follow up that question by considering whether in such case the party must be actually and corporally resident within the jurisdiction of the County Court at the time of action brought, in order to oust the superior Court of its concurrent jurisdiction. Our decision proceeds on the narrower ground, that the plaintiff's residence in town having been entirely subservient to the purposes of his business, and that alone, and not as a place of residence, and his family establishment and home having been in Margate, he must be considered as having dwelt at the latter place alone." Applying the principle of those cases to the facts found here, it is plain that 25 Clowance street was not at the time he signed the notice this man's true place of abode, and therefore the statute has not been complied with.

Lush, Q. C., in reply.—*Kerr v. Haynes* was decided upon the narrow ground that the house in town was entirely subservient to the party's business. [BYLES, J.—*There was no accommodation *104] for the man's family in the town-house. KEATING, J.—Nor was there in Whithorn, app., Thomas, resp.] The residence in Tewkesbury in the last-mentioned case was merely colourable. [BYLES, J.—Suppose this had been a question of domicile, and the place in Fore Street had been in Calais, could Mr. Curtis have been said to have changed his domicile?] It is submitted not. [KEATING, J.—May not the object of requiring the place of abode of the objector have been to enable the party objected to to go to the objector and ask him on what ground he objects to his qualification?] That may have been one object: but the main object was that the objector might be identified. Any person objecting to Curtis's name being retained upon the list, might have served him with a sufficient notice by leaving it at No. 25, Clowance Street. [ERLE, C. J.—It certainly is an uncommonly shadowy occupation at 25, Clowance Street. It is evident that if the Fore Street concern had turned out well, the mother would have seen very little more of her son at Clowance Street. BYLES, J.—The statement shows that he had a strict legal estate,—a very small one, it is true, viz., that of tenant at will,—in the house in Clowance Street.] *Bailey v. Bryant*, 28 Law J., Q. B. 86, was also referred to.(a)

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the Court: (b)—

In this case we think the revising barrister was right in requiring that the objector should state his true place of abode, and that, if he had *bonâ fide* two *places of abode, he might state either. *105] We also agree with him in thinking that the objector actually resided with his family and carried on his business at No. 94, Fore Street, at the time of objection, and that, if Fore Street had been stated, it could not have been objected to with success.

(a) See the observations upon this case in *Butler v. Ablewhite*, 6 C. B. N. S. 740 (E. C. L. R. vol. 95).

(b) The Judges present at the argument were, Erle, C. J., Williams, J., Byles, J., and Keating, J.

But the question before us is, whether Clowance Street is not also shown to be his true place of abode, by reason of the facts that he continued tenant at will to his mother of the house there, and had the intention of returning, and had left some furniture, and had slept there at the stated times. We consider it to be rather a question of fact than of law. The gratuitous tenancy at will to the mother, with an intention to return, is in close analogy with a liberty to stay at his mother's house when he should choose. He was personally absent from Clowance Street at the time when the party objected to might require information, and, during great part of the time between the objection and the revising, the house appears to have been empty.

We think the revising barrister was not bound in law to find Clowance Street to be the true place of abode, by reason of the tenancy at will, under the circumstances stated; and we therefore affirm his decision.
Decision affirmed.

*County of KENT.—Eastern Division. [*106

**WILLIAM MINTER BUSHELL, Appellant; BENJAMIN
RICHARD EASTES, Respondent. Nov. 19.**

A. was in 1826 appointed parish clerk of St. J., Dover; and by license under the seal of the Archbishop of Canterbury, dated in 1832, he was confirmed in his office, "together with all and singular the fees, salaries, and profits either by law or ancient custom belonging to the same." Part of the emoluments attached to the office consisted of the clerk's share of an ancient due payable to the clerk and sexton upon the opening of every grave in the churchyard of the parish; and this exceeded 40s. a year. The parish clerk had not himself to perform any of the work of or incident to the opening of the graves, this being done by the sexton.

The revising barrister held that the ancient fee was in the nature of a remuneration for services rendered in conducting the funeral rites, and not a payment or emolument issuing out of or charged upon any land, and therefore that the parish clerk was not entitled to be registered:—Held, that his decision was right.

At a Court held on the 25th of September, 1861, at Dover, in the eastern division of the county of Kent, for revising list of voters for the parishes in the polling district of Dover, Benjamin Richard Eastes duly objected to the name of William Minter Bushell being retained on the list of voters for the parish of St. James, Dover.

It was proved before the revising barrister, that William Minter Bushell was in the year 1826 duly appointed parish clerk of the said parish of St. James, Dover; which appointment he held, and which his predecessors had theretofore held, for life.

It was further proved, that, by license under the seal of the Archbishop of Canterbury, dated the 23d of August, 1832, the said William Minter Bushell was confirmed in his said office, "together with all and singular the fees, salaries, and profits by law or ancient custom belonging to the same."

It was also proved that a part of the emoluments attached to the said office of parish clerk actually received by the said William Minter Bushell during the period of his holding the said office, and by his predecessors therein, consisted of the clerk's share of an ancient due payable to the clerk and sexton upon the opening of every grave in the churchyard of the said parish of St. James, Dover.

*107] *It was further proved that the clerk had not himself to perform any of the work or labour incident to the opening of the graves; this being performed by the sexton.

It was further proved that the sexton received a fee for the making of each grave, besides the fee he shared with the clerk on the opening of the grave.

The clerk's share of the fee paid on the opening of the grave was proved to amount annually to 40s. and upwards, and was described in the vestry books of the parish as "an ancient fee due to the clerk."

Upon this state of facts, it appeared to the revising barrister that the ancient due was in the nature of a remuneration for services rendered in conducting the funeral rites, and that it was not a payment or emolument issuing out of land, or in anywise charged upon the soil of the churchyard, over which neither sexton, clerk, or vestry had any power or control. He therefore held that the said William Minter Bushell was not entitled to be retained upon the said list of voters, and expunged his name therefrom.

If the decision of the revising barrister was correct, the list was to remain without alteration. If the decision was incorrect, the name of the said William Minter Bushell, with his address, and particulars of his qualification ("freehold office, as parish clerk of St. James, Dover"), was to be added to the revised list of voters for the said parish of St. James, Dover.

Macnamara, for the appellant.—It is submitted that the appellant is under the circumstances stated in this case entitled to be registered in respect of a freehold office; and, further, it is submitted that, if necessary, it sufficiently appears that the office is connected with freehold land to make it a complete and perfect qualification. It will be

*108] material to bear in mind the *statute upon which these freehold votes rest, viz., the 8 H. 6, c. 7. The statute recites, that "whereas the elections of knights of shires to come to the parliaments of our lord the King in many counties of the realm of England have now of late been made by very great, outrageous, and excessive number of people dwelling within the same counties of the realm of England, of the which most part was of people of small substance and of no value, whereof every of them pretended a voice equivalent as to such elections to be made with the most worthy knights and esquires dwelling within the same counties, whereby manslaughter, riots, batteries, and divisions among the gentlemen and other people of the same counties shall very likely rise and be, unless convenient and due remedy be provided in this behalf:" and then it proceeds to enact "that the knights of the shires to be chosen within the same realm of England to come to the parliaments of our lord the King hereafter to be holden, shall be chosen in every county of the realm of England by people dwelling and resident in the same counties, whereof every one of them shall have *free land or tenement* to the value of 40s. by the year at the least above all charges; and that they which shall be so chose shall be dwelling and resident within the same counties; and such as have the greatest number of them that may expend 40s. by the year and above, as afore is said, shall be returned by the sheriffs of every county knights for the parliament, by indentures sealed between the said sheriffs and the said choosers so to be made."

The object of that statute was, that none should vote in county elections but those who can permanently expend 40s. a year at least arising out of freehold. [WILLIAMS, J.—It has long been settled that a parish clerk not having a freehold interest in house or land in right of his office cannot vote: Elliott, 2d *edit. 23.] It was so decided by the Middlesex committee in 1804. That resolution, [*109 however, cannot affect this case. And none of the subsequent statutes prevent a man from acquiring a vote in respect of a freehold office. The word used in the statute is "franktenement" (somewhat incorrectly rendered "free land or tenement"), which clearly embraces an office for life, whether connected with land or not. "Tenementum," says Lord Coke, Co. Litt. 6 a, "is a large word to pass not only lands and other inheritances which are holden, but also offices, rents, commons, profits appender out of lands, and the like, wherein a man hath any franktenement, and whereof he is seised ut de libero tenemento." See also Co. Litt. 20 a. A writ of entry in the nature of assize will lie for an office: Fitz. N. B. 192 E. In 2 Bl. Com. 16, it is said: "*Land* comprehends all things of a permanent, substantial nature; being a word of very extensive signification. *Tenement* is a word of still greater extent, and, though in its vulgar acceptation is only applied to houses and other buildings, yet, in its original, proper, and legal sense, it signifies everything that may be *holden*, provided it be of a permanent nature, whether it be of a substantial and sensible or of an unsubstantial ideal kind. Thus, liberum tenementum, franktenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like; and, as lands and houses are tenements, so is an advowson a tenement: and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are all of them, legally speaking, tenements." Blackstone, at p. 86 of the same volume, gives a definition of an "office." He says: "Offices, which are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, are also incorporeal *hereditaments, whether public, as those of magistrates, or private, as of bailiffs, [*110 receivers, and the like: for a man may have an estate in them, either to him and his heirs, or for life, or for a term of years, or during pleasure only." According to the statement of this case, the appellant clearly holds an "office" within that definition. In Heywood on County Elections, p. 65, it is said: "The statute of Henry the 8th requires each voter to have a qualification in 'free land or tenements to the value of 40s. by the year.' By the 18 G. 2, c. 18, s. 3, no person shall vote for the electing of a knight or knights of the shire 'in respect or in right of any messuages, lands, or tenements,' which have not been assessed to some aid granted by land-tax twelve calendar months next before such election. The word *tenement* in its vulgar acceptation is usually applied to houses and other buildings, yet, in its original, proper, and legal sense, it signifies everything that may be *holden*, provided it is of a permanent nature, whether it be of a substantial and sensible, or of an unsubstantial ideal kind. Thus, the word liberum tenementum, franktenement, or freehold, is applicable not only to land and houses, but also to offices, rents, commons, tithes and the like; and a franchise, an office, a peerage, &c., are legally

speaking *tenements*. Taking it in this sense, persons holding offices in fee or for life, whether they concern lands or not, may be said to have a freehold therein; and, being duly rated to the land-tax, have frequently been admitted to vote at the elections of knights of the shire. It may be doubted whether persons possessed of public offices in fee or for life ever were suitors at the county courts, and, therefore, if the elections of knights of the shire were in ancient times confined to such suitors, as has been asserted with much appearance of reason whether they were permitted to vote with them there. But recent *usage had confirmed them in the franchise, and, from the 18 *111] G. 2 to the decision of the Middlesex committee hereafter mentioned, the question had been whether officers claiming to vote were duly assessed to the land-tax for the limited time, not whether they possessed the necessary estate." [WILLIAMS, J.—At p. 67, Serjeant Heywood says: "The committee which sat upon the election for Middlesex in 1804, after a long discussion and able argument (see Ord's Case, 2 Peckwell, 33), laid down the general principle, that 'the holder of an office for life, not having a freehold interest in house or land in right of his office, had no right to vote.'" And the learned serjeant adds: "This rule is so consonant to the ancient simplicity of the common law, and so reasonable in itself, that it has been universally approved of and adopted at all the county elections which have since taken place."] The resolution of 1804 was not justified by the state of the statute law at that time or now in relation to county votes: see 7 & 8 W. 3, c. 25, 10 Ann. c. 23, s. 2, 18 G. 2, c. 18, ss. 1—5, 20 G. 3, c. 17, s. 1, 22 G. 3, c. 41, 28 G. 3, c. 36, s. 6. The only statutes bearing upon the subject since the year 1804, are the Reform Act, 2 W. 4, c. 45, which passed for the purpose of extending the franchise, and the Registration Act, 6 & 7 Vict. c. 18, which was directed to another object. [BYLES, J.—Are you right in saying that the Reform Act *112] did not restrain the franchise?] The 18th section(a) certainly *places some limitation on the right of voting in respect of freeholds for life; but there is nothing in that section to prevent one who holds a freehold office for life from voting: the language of the section must be construed with reference to the subject-matter. The 22d section repeals the 18 G. 2, c. 18, s. 3, enacting, that, "in order to entitle any person to vote in any election of a knight of the shire or other member to serve in any future parliament, in respect of any messuages, lands, or tenements, whether freehold or otherwise, it shall

(a) Which enacts "that no person shall be entitled to vote in the election of a knight of the shire to serve in any future parliament, or in the election of a member or members to serve in any future parliament for any city or town being a county of itself, in respect of any freehold lands or tenements whereof such person may be seised for his own life, or for the life of another, or for any lives whatsoever, except such person shall be in the actual and bona fide occupation of such lands and tenements, or except the same shall have come to such person by marriage, marriage settlement, devise, or promotion to any benefice or to any office, or except the same shall be of the clear yearly value of not less than 10*l.* above all rents and charges payable out of or in respect of the same; any statute or usage to the contrary notwithstanding: Provided always, that nothing in this act contained shall prevent any person now seised for his own life, or for the life of another, or for any lives whatsoever, of any freehold lands or tenements in respect of which he now has, or but for the passing of this act might acquire, the right of voting in such respective elections, from retaining or acquiring, so long as he shall be so seised of the same lands or tenements, such right of voting in respect thereof, if duly registered according to the respective provisions hereafter contained."

not be necessary that the same shall be assessed to the land tax." [BYLES, J.—Unless you can make out that the appellant was qualified to vote in respect of his office before the passing of the Reform Act, you do not advance a single step. *Welsby*, who appeared for the respondent, intimated that he did not mean to contend that the Reform Act took away from the appellant any right which he had before.] There clearly is nothing in the Reform Act which is at all inconsistent with this claim. [WILLIAMS, J.—Suppose the office be one the duties of which are to be *performed in two or more counties, how [*113 would it be registered?] If the office be in any way connected with land, upon a fair and liberal construction of the statute of H. 6, the claim to vote must prevail. This, at all events, is as much connected with realty as tolls are: and, as to these, Mr. Elliott says, p. 38: "Tolls which are incorporeal hereditaments, and which, when issuing out of and collateral to land, are tenements within the definition of Lord Coke (Co. Litt. 6, a), though not there enumerated by him, appear to be of a real nature, and sufficient to confer the elective franchise." [BYLES, J.—In no instance, since the resolution in *Ord's Case*, has a parish clerk been allowed to vote.] That must be admitted; and, if the resolution of 1804 be binding upon this Court, and the office here is not sufficiently connected with realty to distinguish it, the present claim must fail.

Welsby, contra, was not called upon.

ERLE, C. J.—I am of opinion that the decision of the revising bar-
rister in this case was right. I do not stop to inquire whether the
office of parish clerk is one which comes within Lord Coke's defini-
tion of a freehold tenement. But I am clearly of opinion that a parish
clerk is not entitled to vote in respect of his office. The resolution
of the Middlesex Committee in 1804 has uniformly been acted upon
since by persons whose duty it was to deal with these questions. And
the whole frame of the Reform Act is consistent with the supposition
that the legislature were well aware of that resolution, and is not con-
sistent with the claim put forward upon the present occasion. On the
first point, therefore, I am against the argument urged by Mr. *Macna-*
mara. I am also against him upon the second point. There is nothing
in the statement of *the case to connect the emoluments of this [*114
office with profits arising from land. I think the revising bar-
rister put the right construction upon the evidence before him when
he held that the fee received by the parish clerk was in the nature of
a remuneration for services rendered in conducting the funeral rites,
and not a payment or emolument issuing out of or charged upon the
land. For these reasons, I think the objection to the vote was well
founded.

The rest of the Court concurring,

Decision affirmed, with costs.(a)

(a) The respondent declined to take the costs, the case having been stated under an arrange-
ment, for the purpose of determining the point.

County of KENT.—Eastern Division.

WILLIAM HALL, Appellant; CHARLES EDWARD LEWIS,
Respondent. Nov. 19.

One of the "six preachers" of the cathedral church of Canterbury claimed to be registered in respect of a "freehold office." The appointment was by the Archbishop of Canterbury, and the office held during good behaviour, provided the party remained in the diocese and preached at least twice a year in the cathedral. He received an annual stipend of 32*l.* from the dean and chapter of Canterbury, which was paid out of the chapter revenues, which were derived from lands in various places vested in the dean and chapter :—Held,—reversing the decision of the revising barrister,—that the claimant had no such freehold office or equitable interest arising out of land as to entitle him to be registered.

The like as to the lay clerks and the bell-ringer.

At a Court held at Canterbury for the revision of the list of voters for the Eastern division of the county of Kent, the Rev. Francis James Holland, Joseph Burr, and Thomas Parnell severally claimed to be placed on the list of voters for the said Eastern division, in respect of property situate wholly or in part within the parish called the Ville *115] of Christ Church, in the *city of Canterbury, and were duly objected to by Benjamin Eastes, a person on the register of voters, on the ground that they did not possess the requisite qualification. The claims were set forth in the following form :—

Christian name and surname.	Place of abode.	Nature of qualification.	Street, lane, &c.
Holland, Francis James.	14, St. Dunstan's Terrace, Canterbury.	Freehold office.	As one of the six preachers in the cathedral church, Canterbury.
Burr, Joseph.	16, Orchard Street, St. Dunstan's, Canterbury.	Freehold office.	Lay clerk, Canterbury Cathedral.
Parnell, Thomas.	St. Radigund's Street, Canterbury.	Freehold office.	Bell-ringer, Canterbury Cathedral.

As regards the claim of the Rev. Francis James Holland, the facts proved before the revising barrister were, that the said Rev. Francis James Holland was appointed by the Archbishop of Canterbury one of the six preachers of Canterbury Cathedral; that he held his office during good behaviour, provided he remained in the diocese and preached at least twice a year in the said cathedral; and that he received an annual stipend of 32*l.*, as preacher, from the treasurer of the dean and chapter of Canterbury, at the audit-room in the Cathedral precincts, situate within the ville of Christ Church. It was further proved that each of the six preachers formerly received an annual stipend of 20*l.* a year and a house to live in, but that the stipend was afterwards increased and the house taken away.

As regards the claim of Joseph Burr, the facts proved, were, that, at a chapter held in July, 1834, the said Joseph Burr was appointed by the said dean and chapter of Canterbury Cathedral one of the eight lay clerks of the said cathedral; that the appointment was *116] *for life, and was made by a resolution of the chapter, a minute of which resolution was recorded in the records of the chapter-house and signed by the said Joseph Burr: that a salary of 80*l.* a year

was attached to the office of lay clerk, and was paid annually to the said Joseph Burr by the treasurer of the said dean and chapter in the said audit-room of the said cathedral, situate within the said ville of Christ Church; and that the duty of the said Joseph Burr as lay clerk, was, to attend and officiate as clerk a certain number of times in each year, during the celebration of Divine Service in the said cathedral.

As regards the claim of Thomas Parnell, it was proved, that, in 1857, the said Thomas Parnell had been appointed by the said dean and chapter one of the eight bell-ringers in the said cathedral; that the appointment was for life; and that an annual stipend of 20*l.* a year, payable out of the cathedral funds, was attached to the said office of bell-ringer, and was paid annually to the said Thomas Parnell by the said treasurer of the said dean and chapter at the said audit-room in the said ville of Christ Church; and that it was the duty of the said Thomas Parnell to attend from time to time to assist in ringing the bells at the said cathedral prior to the celebration of Divine Service therein.

It further appeared that the appointment to these different offices, the duties incident to them, and the amount of salary payable to the holders or occupants of the said offices, were regulated by certain statutes of the Metropolitan Cathedral of Christ Church, Canterbury, which were produced in Court and read; and it was agreed that these statutes should form part of the present case, and, if necessary, should be referred to as evidence in support of the claims of the respective claimants.

*It was further proved that such salaries were paid out of [*117 the chapter revenues, which were derived either wholly or in part from certain lands and tenements situate in the parish of Christ Church Ville and other parishes in the said eastern division of the said county, and elsewhere out of the said county, and which lands and tenements were vested in the dean and chapter of the said cathedral.

Upon this state of facts, the revising barrister retained the names of the said Francis James Holland, Joseph Burr, and Thomas Parnell on the said list of voters.

The names of nine other persons objected to under circumstances similar to the above were likewise retained on the list, and the appeals in those cases consolidated with the principal case.

If the Court should be of opinion that the decision of the revising barrister was incorrect, the names of the several persons above referred to were to be expunged from the register. If the Court should be of opinion that his decision was correct, the list was to remain without amendment.

Welsby, for the appellants.—After the decision in *Bushell*, app., *Eastes*, resp., antè, p. 106, it must be assumed that a mere appointment to an office,—supposing these to be offices,—unconnected with any interest in land, will not confer a right of voting. In this respect, therefore, all these three claimants stand upon the same footing. Each is to receive a certain stipend which it was proved was paid out of the chapter revenues, which revenues are derived either wholly or in part “from lands in the parish of Christ Church Ville and other parishes in the eastern division of the county of Kent, and out of the county,” vested in the dean and chapter. This differs in no degree from the

*118] *case of any gentleman who pays the wages of his butler or his gardener out of his general funds from whatever source derived. It does not appear that any one of these claimants receives 40s. a year out of lands of the dean and chapter within the county.

Macnamara, for the respondents.—The revising barrister has found as a fact that the stipends of the claimants are paid out of the chapter revenues, which are derived from lands. There was no question about the value. It is submitted, that, under the circumstances, the dean and chapter are trustees for these parties; and, if so, they clearly have such an equitable interest in the land as to entitle them to vote. That these persons are appointed to "offices," there can be no doubt: and the revising barrister has so found. They hold offices to which public duties are attached; and they hold them for life, provided they perform the duties attached to them. [ERLE, C. J.—What is there to make their salaries a charge upon any land?] Nothing, unless the finding that they are paid out of the revenues of the dean and chapter, which are derived from lands.

ERLE, C. J.—I am of opinion that the decision of the revising barrister in this case should be reversed. It is not necessary to make the determination of this case turn upon whether or not these claimants held "offices," because, if they were appointed and had an equitable right to have their salaries paid out of the proceeds of lands (within the district), that would give them a sufficient qualification. But I am unable to find any equitable interest which they can possibly have in any lands anywhere. There is a mere agreement to pay them certain stipends at the audit-room in the cathedral precinct. I cannot *119] distinguish *between the case of these functionaries and that of any private gentleman's servants. The payment is made out of the general funds of the dean and chapter. There is no vestige of any equitable interest in land.

WILLIAMS, J.—I am of the same opinion. It may be that the claimants have certain functions for life, and that they are entitled to receive certain yearly sums out of the revenues of the dean and chapter. But there is nothing to show that they have any interest whatever in any land.

BYLES, J., and KEATING, J., concurred.

Decision reversed.

END OF THE REGISTRATION CASES FOR 1861.

*120]

*MEMORANDA.

IN the course of the Vacation succeeding this Term, the Hon. Mr. Justice Hill resigned his office of Judge of the Court of Queen's Bench.

John Mellor, Esq., of the Inner Temple, one of Her Majesty's Counsel learned in the Law, was appointed a Judge of the Court of Queen's Bench, in the room of Mr. Justice Hill, resigned. He gave rings with with the motto, "Lex ratione probatâ."

The learned Judge took the oaths and his seat in Court on the second day of the Term. He shortly after received the honour of knighthood.

CASES

ARGUED AND DETERMINED

III

THE COURT OF COMMON PLEAS,

III

Michaelmas Term,

XXV. VICTORIA. 1861.

The Judges who usually sat in banco in this term, were—

ERLE, C. J.

BYLES, J.

WILLIAMS, J.

KEATING, J.

SMITH and Others v. SMITH and Others. Nov. 5.

Testator by his will, made before 1838, gave all his real and personal estate to trustees, in trust, after payment of his debts, &c., to convert the personal estate into money, to be placed at interest. He then gave all "the profits" arising from his real estate and the interest of his personal estate to his wife, to be applied to her maintenance and support at the discretion of the trustees, if she should need the whole of it, during her life. He then gave a legacy of 500*l.* to his niece. He then willed that his trustees should put his kinsman G. S. into possession of a close called 'The First Close,' which he gave to the said G. S.; and then followed this devise,—"Then I give all that my close or piece of land called 'The Second Close' with all the appurtenances, unto my kinsman W. S., son of my late brother W. S.:"—

Held, that a sufficiently clear intention to give W. S. an estate in fee was shown, to counter-vail the absence of words of limitation.

THIS was an action of ejectment brought for the recovery of a close or piece of land called "The Second Close," situate in the lordship of Pailton, in the county of Warwick; and by consent of the parties, and under a Judge's order, pursuant to the Common Law *Procedure Act, 1852, the following case was stated for the opinion [*122 of the Court:—

Joseph Smith and Thomas Smith being seised in fee as tenants in common of the said close called "The Second Close," the said Joseph Smith duly made and executed his last will and testament in writing, dated the 17th of March, 1824, and thereby gave and devised all that his undivided moiety or half part, and all other his right, share, and interest of and in all those several closes, pieces, or parcels of arable, meadow, and pasture land of which he was seised jointly with his brother Thomas Smith, and containing sixteen acres or thereabouts,

situate and being in the parish of Pailton, in the county of Warwick, then in his (the testator's) own occupation, and including the said close sought to be recovered, unto and to the use of his said brother Thomas Smith, his heirs and assigns, for ever: and, in an event which did not happen, the testator gave and devised the same unto and to the use of his own right heirs, for ever, subject nevertheless and charged and chargeable, after the decease of the said Thomas Smith, with the payment of certain legacies bequeathed by the will.

The said Joseph Smith died on or about the 18th of April, 1824; and the said Thomas Smith, then becoming and being seised in fee of the entirety of the said close, duly made and executed his will, bearing date the 8th of January, 1835, in the words following:—

"In the name of God, Amen. I, Thomas Smith, of Churchover, in the county of Warwick, farmer, being of sound mind, memory, and understanding, do make this my last will and testament in manner and form following, that is to say,—First, I give all my goods, chattels, stock of cattle, implements in husbandry, money at interest, *123] rights, credits, whatsoever and *wheresoever, and of what kind soever it may consist of, and all my real and personal estate whatsoever and wheresoever, and of what kind soever it may consist of, into the hands of my kinsman John Clarke, of Pailton, farmer, and my friend Richard Brumage, of Rugby, baker, in trust to and for the several uses hereinafter mentioned, that is to say, after the payment of all my just debts, funeral expenses, and the expense of proving this my last will, are paid, then my will is that my said trustees shall convert all my personal estate into money, and place the said money at interest. Then I give all the profits arising from my real estate, and the interest of my personal estate, unto my wife Francis Smith, to be applied towards her maintenance and support of her at the discretion of my said trustees, if she shall need the whole of it, during her natural life. Then, after her decease, I give unto my niece Mary Clarke, wife of my trustee John Clarke, the sum of 500*l.*; and, in case she shall depart this life before she shall be possessed of the said 500*l.*, then my will is that my said trustees shall divide the said legacy in equal shares amongst all the surviving children of my niece Mary Clarke aforesaid. Then my will is that my said trustees shall put my kinsman George Smith in possession of all that my close or piece of land called 'The first Close,' situate in Pailton Lordship, which close I give unto my kinsman George Smith, together with all the appurtenances thereunto belonging. Then I give all that my close or piece of land called 'The Second Close,' with all the appurtenances thereunto belonging, unto my kinsman William Smith, son of my late brother William Smith." And, after giving another close in similar words, the said testator willed that his said trustees should "divide all the residue and remainder of his personal estate" amongst the persons in his said will mentioned.

*124] *The testator died in 1838, and his widow died shortly after him. At the time of making the said will, the said testator was about seventy-five years of age, and without children; and the claimant George Smith, who is the devisee of "The first Close," was the son of the testator's nephew and heir presumptive, and, at his death, became his heir at law.

The defendants claim under the said William Smith, the devisee, who died in December, 1859.

The testator had no other real estate than the lands specifically devised in the said will.^(a)

All his debts, funeral expenses, and the expense of proving the will, were satisfied by the trustees out of the personal estate.

The question for the opinion of the Court was, whether the claimant George Smith was entitled to recover.

Field, for the plaintiff.—The question is whether, under the second devise in the will of Thomas Smith (which was made before the passing of the Wills Act, 7 W. 4 & 1 Vict. c. 26), the devisee William Smith took an estate in fee or an estate for life. It is submitted that he took for life only, there being no words of limitation, and nothing in the context whence the Court can necessarily infer that the testator intended to give him the fee. The authorities upon this subject, which are very numerous, are all collected in Jarman on Wills, where the result of them is thus summed up,—Vol. 2, c. 83, 2d edit. 210,—“Nothing is better settled than that a devise of messuages, lands, tenements, or hereditaments (not estate), without words of limitation, occurring in a will which is not subject to the newly-enacted rules of testamentary *construction, confers on the devisee an estate for life only, notwithstanding the testator may have commenced his will [*125 with a declaration of his intention to dispose of his whole estate, or may have given a nominal legacy to his heir, or may have declared an intention wholly to disinherit him, or the will may contain an antecedent devise to the heir for life of the testator’s property which is the subject of dispute, or the devise in question may be to a class embracing the heir, as to the testator’s children, or, lastly, notwithstanding there may, in another part of the will, or in the immediate context, be a devise expressly for life, affording the argument, therefore, that the testator meant something more, or at least different, by an indefinite devise; though any, or, it is conceived, the whole of these circumstances concur in the same will, it is indisputably clear that such a devise will confer only an estate for life.” [WILLES, J.—The particular devise commences with the word “Then.” What does that refer to? If it may be read “thence” or “thenceforward,” it would give William a fee.] It may be that the trustees took a fee: but the testator only charges his personal estate with his debts and funeral and testamentary expenses; and the trustees are to hold only until the death of the wife. The devise in question, however, is not to take effect until after her death. The estate is given to the trustees for certain limited purposes, then to the wife for life, then an executory devise over in favour of William Smith as to the property now in question. [WILLES, J.—In *Blagrove v. Blagrove*, 4 Exch. 550, 568,† Parke, B., cites with approval the rule laid down by the Court of Exchequer in *Watson v. Pearson*, 2 Exch. 581,† that, “where the purposes of the trust on which an estate is devised to trustees are such as not to require a fee in them, as, for instance, where the trust is to pay *annuities, or to pay over rents and profits to a party for [*126 life, there, if, subject to the specified trusts, the estate is given

(a) This was added during the argument, at the suggestion of the Court, the fact being admitted to be so.

over, the parties taking under such devise over have been held to take legal estates; the estate given to the trustees (even given with words of inheritance) having been in such cases taken to have been meant to be coextensive only with the trust to be performed." In *Doe d. Small v. Allen*, 8 T. R. 497, the testator devised thus,—“As to what real and personal estate it has pleased God to bless me with (all my debts being first paid out of my personal, and, if that is not sufficient, out of my real estate), I give and dispose of the same as follows,—I devise all my messuages, lands, tenements, and hereditaments in S., &c., to A.:" and it was held that A. took only a life estate. Lord Kenyon there says: “Although the Court are not now prepared to give their final judgment on this special verdict, I cannot forbear expressing my present sentiments on it. It has been frequently lamented, that, at first, after the passing of the Statute of Wills, the Courts did not require the same technical expressions in a will to pass a real estate as are necessary in conveying the estate by deed; for, then we should not have had more cases on the construction of wills than of deeds; and it very rarely happens now that a question arises on the construction of a limitation in a deed. There are certain received words that are well known and have from time to time been used by conveyancers in drawing deeds; and these exclude all doubt as to their legal meaning: but, in expounding wills, a greater latitude of construction has been allowed. After an anxious endeavour to discover the intention of a testator, it frequently happens that we can only conjecture what his intention was; and sometimes there is scarcely enough to form even a conjecture. Formerly, Sir J. Bland *127] made his own will; and, at the close of it, he said that he had disposed of his estate in so clear a manner that he thought it impossible for any lawyer to doubt about it. This will was afterwards contested; and it came before Lord Hardwicke, who said that he was so utterly at a loss to conceive what was the real intention of the testator, that he wished he could find some ground on which to form a conjecture. So, in the case of *Right d. Mitchell v. Sidebotham*, Dougl. 759, Lord Mansfield, whose mind was as equal to the explanation of difficult points as that of any lawyer who ever sat in Westminster Hall, admitted the difficulty of deciding questions of this kind, saying, ‘I verily believe, that, in almost every case where by law a general devise of lands is reduced to an estate for life, the intent of the testator is thwarted; for, ordinary people do not distinguish between real and personal property. The rule of law, however, is established and certain, that express words of limitation, or words tantamount, are necessary to pass an estate of inheritance.’” In *Denn d. Gaskin v. Gaskin*, Cowp. 657, the testator devised thus,—“As to all such worldly estate as God has endued me with,” I give and bequeath as follows,—“I give and devise all that my freehold messuage and tenement lying in G., together with all houses, &c., and appurtenances whatsoever belonging to the same, to M. R., G. R., and T. R. equally:” and then he bequeathed, amongst other pecuniary legacies, 10s. to his heir at law: and it was held that the devisee took an estate for life only. Lord Mansfield said: “It is settled in devises, as well as in deeds, that, if no words of limitation are added, the devisee can only take an estate for life; because the law implies a life estate only

where there are no words of limitation. But, as there are no technical words necessary in a will, if the testator makes use of what is *tantamount, as, if he says, 'I give to such a one in *fee simple*,' [*128 or '*all my estate*,' that will carry *all his interest* in the land devised. But there must be words in the will to control the rule of law; which I believe, in a variety of cases, thwarts the intention of the testator. I suspect extremely, that, in this very case, the testator meant to give his nephews a fee in the premises in question; for, he had no other landed property. He makes them residuary legatees of his personalty, and gives a disinheriting legacy to his heir at law, agreeable to the vulgar notion taken from the Roman law, that an heir is cut off with a shilling. Because, by the Roman law, a will that passed by the heir was called *inofficiosum testamentum*. But the single question is, whether we can find any words in the will to take this case out of the rule of law: if we cannot, it must be adhered to. I think it is impossible to find words in this will sufficient to control the rule of law." In *Frogmorton d. Wright v. Wright*, 3 Wils. 414, the testator by his will, commencing "as touching the disposition of all my temporal estate as it hath pleased Almighty God to bestow upon me," I give and dispose thereof as followeth,—"*Imprimis*, first of all, I will that my debts and funeral charges be paid and discharged. Item, I give unto Henry Wright and Nathan Wright, my nephews, two houses at Bank, in Leeds, with a croft and appurtenances belonging to them, to be equally dealt between them. Item, I give unto William Wright, my nephew, two houses at Seacroft, with a croft and appurtenances belonging to them, now in the occupation of J. C. and E. T.," &c. De Grey, C. J., said: "It may seem probable that the testator's intention was that his nephew William should have a fee; but it is a clear rule that there must be express words, or a necessary implication, to disinherit the heir at law: neither of these appear in the present *case, and therefore the legal operation [*129 of the words of the will must govern." In *Right d. Compton v. Compton*, 9 East 267, the circumstance of the testator having given a life estate to his son (his heir at law) did not entitle the grandchildren to the fee, where the devise over to them was without words of inheritance. In *Doe d. Child v. Wright*, 8 T. R. 64, the deviser, after these introductory words, "as touching such worldly and personal estate wherewith it hath pleased God to bless me," gave an estate for life to his wife in his estates in A. and B., and then devised to J. W. "all his lands, freehold, copyhold, and leasehold, in A.," and "all his estate, freehold and copyhold, in B.:" and it was held that J. W. took only an estate for life in remainder in the deviser's estate in A. In giving judgment, Lord Kenyon says: "It has frequently been lamented that the same technical words were not required in wills as in deeds; because, had such a rule been adopted, few questions would have arisen on the construction of wills. Some rules, however, have been established by a series of decisions on this subject: and we should be removing landmarks if we were to abandon that which has been adopted as a rule of property, in the pursuit of a doubtful intention of a testator. Perhaps it would be too critical to advert to particular expressions in a will of this kind, drawn by a person ignorant of the profession: but it is observable, that, in almost

all the other clauses of the will, the testator used the word 'estate,' which is sufficient to pass a fee. He has not, however, used that word in the clause on which the question arises, nor any word equivalent to it; and there is no part of the will that enables me to decide, consistently with the authorities, that J. W. took a fee in the premises in *130] question." (a) In *Doe d. Knocker v. Ravell*, 2 C. & J. *617,† a testatrix, after a preamble "as for such temporal estate as God hath given me, I give, devise, and dispose of it in the following manner," gave to J. R. a house, &c., to come into possession at the age of eighteen, and to S. R. two other houses, &c. (without using any express words to pass the fee), and the residue of her estate, which was limited by enumeration to personalty: she also gave to S. R. the rent of the house before given to J. R. until he was eighteen, and, in the event of his death before that age, directed that all that was left to him should descend and go to S. R.: and it was held that S. R. took an estate for life only in the two houses. [WILLIAMS, J.—That case rather belongs to the first class of cases you referred to.] That case and *Denn d. Gaskin v. Gaskin* are scarcely to be distinguished from the present.

Hayes, Serjt., for the defendants.—The question is purely one of intention,—what, looking at the whole will, did the testator intend? By "all his real estate," he evidently meant "all his interest in the lands." And he gives all to his trustees. [WILLES, J.—A devise to trustees only conveys an estate commensurate with the necessity of the case: *Watson v. Pearson*, 2 Exch. 581;† *Blagrove v. Blagrove*, 4 Exch. 550.†] It is impossible to doubt the intention of the testator here: and there is no case which prevents the Court from giving effect to it. In *Newland v. Shepherd*, 2 P. Wms. 194, the testator, having disposed of some part of his real estate, and of some legacies, devised the residue of his real and personal estate to trustees, their heirs, &c., in trust to pay and apply the interest and produce thereof for the maintenance and benefit of such of his children by his daughter N. as should be living at the time of his decease, until his said grandchildren *131] should *come to the age of twenty-one years or be married: and it was held that the absolute right and property of the real and personal estate passed to the grandchildren after that age. Lord Macclesfield says: "In this case the testator did not care to trust his son-in-law with providing for his children out of his own estate, not only during the time when their maintenance would be least expensive (during their tender years, and when every parent is bound to provide for his children); but even here he takes a care which seems unnecessary: and, can it be imagined that the testator would show a concern for his grandchildren when they did not want it, and leave off that care at the only time when they could be supposed to stand in need of it, viz.: as soon as they should come of age and be marriageable? Besides, it is plain the testator gives all from the heir at law, by vesting the whole estate in fee, as well as the legal property of the personal estate, in trustees, which would not have been done had anything been intended to remain to the daughter and heir: not only the interest, but the produce of the real and personal estate is to be applied by such trustees; and, to help this plain intention of the

(a) And see *Doe d. Wright v. Child*, 1 New Rep. 335.

testator, the word 'produce' shall be taken in the larger sense, and then it will signify whatever the estate will yield by sale or otherwise." [BYLES, J.—The word "produce" was held to be synonymous with "proceeds." WILLIAMS, J.—In 2 Jarman on Wills 224, it is said that the registrar's book shows that the word "produce" was not in the will in that case. BYLES, J.—Mr. Jarman (Vol. I, p. 459) makes Lord Brougham say, on appeal in *Davis v. Davis*, 1 Russ. & M. 645, that *Newland v. Shepherd* had been often questioned: and he refers to *Fonnereau v. Fonnereau*, 3 Atk. 314, 316, where Lord Hardwicke said "he could see no reason to approve *of" that case [*132 as there reported.] In *Peat v. Powell*, Ambler 387, 1 Eden 479, the testator devised the residue of real and personal estate to executors, for A., "till he attain twenty-one, and then the trust to cease;" and it was held that this gave the whole beneficial estate to A.—Lord Keeper Henley saying, "that it was the same as if the testator had said 'I give the estate to trustees, in trust for A. till he attain twenty-one, and then to A. and his heirs.'" So, in *Challenger v. Sheppard*, 8 T. R. 597, it was held, that, where an estate in fee is devised to trustees in trust for A. B., without any limitation of the estate to the cestui que trust, the latter takes the beneficial interest in fee. [WILLIAMS, J.—Those cases, if well founded, depend upon the implied intention of the testator to provide for the management of the estate until the person who is to take the beneficial interest attains an age to manage it for himself. They have but little to do with the case before us. If we are to assume here that the legal fee was in the trustees, our hands are tied. We can decide no other question than that.] In *Knight v. Selby*, 3 M. & G. 92 (E. C. L. R. vol. 42), 3 Scott N. R. 409, by a will made before 1838, the testator devised as follows,—“As to my messuages, lands, and tenements, and real estate, I dispose thereof as follows: I give and devise Whiteacre unto A. and B. and their heirs, for the use of C. for life, and after her decease to the use of D. and E. as tenants in common:” and it was held that D. and E. took a fee. Tindal, C. J., after adverting to the use by the testator of the words “real estate,” says, “There is moreover an express devise to trustees and their heirs, independently of any evidence of intention arising out of the use of the term ‘real estate.’ He (the testator) gave a fee where there was no necessity; as the persons designated as trustees take no estate under the will.” And [*133 Coltman, J., *said: “Giving the land to trustees *and their heirs*” is strong to show that *cestui que trust* were to take the same interest. That was the ground upon which *Challenger v. Sheppard* was decided.” Erskine, J., says: “The cases cited clearly show that words found in the introductory part of the will are not, of themselves, sufficient to carry the fee under a subsequent general devise. Although they indicate an *intention* to dispose of the fee, that intention may not have been carried into effect. Taking, however, the whole of this will together, the testator has shown an intention to dispose of all his interest, and that the devisees in remainder should take a fee. It would have been useless to give the estate to the trustees *and their heirs*, except for the purpose of passing the whole fee to the beneficial devisees.” And Maule, J., says: “The words in the introductory part of this will indicate an intention to use words in a subsequent part of

the will which should operate as a devise of the fee. Still, the intimation of an intention to devise a fee will not of itself enlarge a general devise into a fee. But the preliminary clause throws light upon terms used in the devising clause which otherwise might be doubtful. To understand the meaning of a particular clause, we ought to look at the words which occur both before and after. Here, the word 'heirs' in the introductory part of the will imports absolute ownership. In the subsequent parts of the will, the testator appears to assume that he has sufficiently expressed his intention to pass that absolute ownership; and the will is silent as to the extent of interest which the beneficial devisees in remainder are to take. I think that the intention to pass the fee intimated in the introductory part of the will is sufficiently, though not technically, brought down to the beneficial devisees." [WILLIAMS, J.—No doubt, *Challenger v. Sheppard* *134] and *Knight v. Selby* establish, that, if an estate is given to trustees *and their heirs*, and the uses declared are such as would only give an estate for life, the estate given to the trustees will enlarge the words of the subsequent devise, and give the cestui que use the same estate as if the words of inheritance had been repeated in the devise to him: especially if there are other words in the will to indicate that such was the intention of the testator. In *Challenger v. Sheppard*, the trustees took a legal fee; in *Knight v. Selby*, an equitable fee. The difficulty is, that there are functions here that render it necessary to give the estate to the trustees and their heirs, in order that there may be persons to carry out the will.] The question is altogether one of intention. It is submitted that the trustees took the legal fee, and that their interest determined on the death of the wife. In *Moore v. Cleghorn*, 10 Beavan 423, the devise was to trustees and their heirs "upon trust for the use and benefit of A., B., and C.," without words of inheritance: and it was held that A., B., and C. took in fee. Lord Langdale, M. R., there says: "By the devise to the three trustees their heirs and assigns for ever, the whole estate and interest of the testator in the land passed to them: but the testator declared that the gift was 'upon trust for the use and benefit' of the three boys. Everything, therefore, which the trustees took was given to them in trust for the use and benefit of the three boys. I think, therefore, there is no resulting trust to the testator or his heirs."

Field, in reply.—In conformity with the decision in *Watson v. Pearson*, 2 Exch. 581,† the trustees, having no duty to perform which rendered it necessary that they should take more, have only an estate for life. [WILLIAMS, J., referred to *Doe d. Kimber v. Cafe*, 7 Exch. 675.† There, by a will made before 1838, a *135] *testator devised as follows,—“I give and devise to A., B., and C., and their heirs and assigns, all that (naming the premises), upon trust, nevertheless, to receive the rents and profits, and, after deducting all taxes and expenses whatsoever, to pay the same unto such persons and for such purposes as my daughter E. M. shall direct, and, for want of such direction, to and for her sole and separate use; and, from and immediately after the decease of my said daughter, upon trust to pay and apply the said rents, &c., for and towards the maintenance and education of my said daughter's children then living, during their minority; and, upon the youngest living of my said

daughter's children attaining the age of twenty-one, I give and devise the said house and premises unto all the children of my said daughter who shall be then living, in equal shares and proportions, share and share alike." In one of the devises contained in the will, an estate in fee was devised to the testator's grandson, on attaining twenty-one years; and, by a concluding clause of the will, the testator, as to the residue of his estate not before specifically disposed of, devised and bequeathed the same to his eldest son, to hold to him, his heirs, executors, administrators, and assigns, according to the nature of the several estates, absolutely for ever; and the testator also authorized his trustees, at their discretion, from time to time to grant leases of any part of the premises in trust, for any term not exceeding twenty-one years, at the best rent that could reasonably be obtained, but without taking any fine for such leases; and it was held, that the estate of the trustees and their heirs was to continue only for such time as the objects of the trust required it, and that the power to lease was a power only to be exercised during the continuance of this estate so limited to them; and therefore that the three grandchildren of the testator did *not take a fee in the premises in question, but [*136 took estates for life only, as tenants in common. *Hayes*, Serjt.—There was no power to sell for payment of debts there. *WILLIAMS, J.*—No doubt that is a distinction.] In 2 Jarman on Wills 251, it is said: "The reader will have perceived (though the position has not hitherto been distinctly advanced) that the same principle which determines whether the trustees take any estate regulates also the nature and duration of that estate; the established doctrine being (subject to certain positive rules of construction lately propounded by the legislature, and which will be presently considered) that trustees take exactly that quantity of interest which the purposes of the trust require; and the question is not whether the testator has used words of limitation, or expressions adequate to carry an estate of inheritance; but whether the exigencies of the trust demand the fee simple, or can be satisfied by any and what less estate. Thus, in the case of a devise to a trustee and his heirs, upon trust to *pay and apply the rents* for the benefit of a person for life, and, after his decease, to hold the lands *in trust* for other persons; the direction to apply the rents being limited to the cestui que trust for life, the estate of the trustee will terminate at his decease."

WILLIAMS, J., now delivered the judgment of the Court: (a)—

This case depends on the construction of the will of Thomas Smith, made before the new Wills Act came into operation: and the question is, what quantity of estate in the close for the recovery of which the action is brought passed under the devise of it to *William [*137 Smith, now deceased, through whom the defendants claim.

The will gives all the testator's real and personal estate to trustees, in trust, after the payment of his just debts and funeral and testamentary expenses, to convert the personal estate into money, to be placed at interest; and then the testator gives all "the profits" arising from his real estate, and the interest of his personal estate, to his wife, to be applied to her maintenance and support at the discretion of the

(a) The Judges present at the argument were,—*Williams, J.*, *Willes, J.*, *Byles, J.*, and *Keating, J.*

trustees, if she shall need the whole of it, during her life; and afterwards to his niece Mary Clarke a legacy of 500*l*. Then he wills that his trustees shall put his kinsman George Smith into possession of a close called "The First Close," which he gives to the said George Smith. And this is followed by the devise in question, viz. "Then I give all that my close or piece of land called 'The Second Close,' with all the appurtenances, unto my kinsman William Smith, son of my late brother William Smith."

The plaintiffs say that this devise to William Smith, being without any words of limitation, did not pass more than a life estate; and that the plaintiff George Smith, who is the testator's heir at law, is therefore entitled.

The defendants contend, that, though there are no words of limitation in the devise to William Smith, yet, upon the whole will, a clear intention is sufficiently shown to give him an estate in fee.

The plaintiffs relied on Jarman on Devises, Ch. 33, p. 247 (third edit.), and the authorities there cited, to the effect that nothing is better settled than that a devise of lands without words of limitation, occurring in a will made before the new Wills Act, confers on the devisee an estate for life only, notwithstanding the testator may have *138] commenced his will with a *declaration of his intention to dispose of his whole estate, or the will may contain an antecedent devise to the heir, for life, of the property which is the subject of dispute.

The defendants relied on the cases of *Challenger v. Sheppard*, 8 T. R. 597, *Knight v. Selby*, 3 M. & G. 92 (E. C. L. R. vol. 42), 3 Scott N. R. 409, and *Moore v. Cleghorn*, 10 Beavan 423 (affirmed, on appeal, 9 Jurist 596), and contended, and rightly contended, we think, that these authorities establish the general rule, that, whenever an estate *in fee* is devised to trustees, in trust, without any limitation of the estate of the cestui que trust, the latter takes the beneficial interest *in fee*; because, in such case, everything which the trustees take is given for the benefit of the devisee, and there is therefore no resulting trust for the heir.

But the case of *Doe d. Kimber v. Cafe*, 7 Exch. 675,† shows, that, even where there is a devise expressly to trustees and their heirs upon certain trusts, followed by a devise to A. B., without any words of limitation, the trustees take that quantity of interest only which is requisite for the purposes of the trusts, and A. B. takes only an estate for life, if the legal fee is not requisite for those purposes.

In answer to this authority, the defendants insisted that the trustees in the present case take the legal fee by reason of the trust to pay debts. And we are of opinion, looking at the whole of the will, that the trustees do take the legal fee; for, although the testator's direction to them, after giving them all his real and personal estate, to convert, after payment of his debts, the personal estate into money, and perform the other specific trusts, might *per se* constitute only a charge of the debts on the real estate, yet we think this direction may in the present case be regarded as sufficient to indicate that the testator meant the *139] *trustees to take the legal fee conferred on them by the word "estate," and to hold it after the performance of the other

trusts, in trust for William Smith, to whom it is devised. Our judgment must therefore be for the defendants.

Judgment for the defendants.

OLIVER v. OLIVER. Nov. 8.

The receiver of a letter has a sufficient property in the paper upon which it is written to entitle him to maintain detinue for it against *the sender*, into whose hands it has come as a bailee.

DETINUE for letters. Pleas, non detinet, and that the letters were not the property of the plaintiff. Issue thereon.

The cause was tried before Channell, B., at the last assizes at Exeter. The facts were as follows:—The plaintiff and defendant were brothers. The letters for the recovery of which the action was brought, which related to family affairs, were written and sent by the defendant to the plaintiff, and had been given back by the plaintiff to the defendant; and proof was given of a demand and refusal to restore them. There was contradictory evidence as to whether the letters had been given by the plaintiff to the defendant to be kept by him as his own property, or whether they had been merely handed to the defendant as custodian, to be redelivered to the plaintiff on request.

The learned Judge told the jury that the receiver of a letter had such a property in the paper as to entitle him to maintain an action against the sender if by any means it got back into his hands; and that it was for them to say, upon the evidence before them, whether the letters in question had been given to the defendant that he might retain them as his own property, in which case the defendant would be entitled to their verdict, or whether they were merely deposited with him to take care of them for the plaintiff, in which case the latter would be entitled to the verdict. [*140]

The jury at first proposed to return a verdict for the defendant, if he would consent to deposit the letters with a third party. This not being acceded to, they asked the learned Judge if a verdict for a farthing would carry costs. The learned Judge declined to answer the question: and ultimately the jury returned a verdict for the plaintiff for one farthing.

His lordship declined to make any order either as to the delivery up of the letters or as to the costs.

Coleridge, Q. C., on a former day in this term, moved for a new trial on the ground of misdirection and that the verdict was against the evidence.—The learned Baron ought to have told the jury that the plaintiff had made out no case; the receiver of a letter having no such property therein as to enable him to maintain an action for it against the sender, by whatever means it may have got into his hands. Lord Hardwicke, in *Pope v. Curl*, 2 Atk. 342, lays it down that “at most, the receiver has only a joint property with the writer.” And this was acted upon by Lord Apsley, C., in *Thompson v. Stanhope*, Ambler 737, and by Lord Eldon, in *Gee v. Pritchard*, 2 Swanst. 402, where it was held that the jurisdiction to restrain the publication of letters is founded on a right of property in the writer. That the receiver has no right to publish their contents without the consent of

the sender, is clear: see the cases collected in *Prince Albert v. Strange*, 1 M'N. & G. 25.

ERLE, C. J.—We will confer with my Brother Channell before granting a rule. *Cur. adv. vult.*

*ERLE, C. J., now said: In this case my Brother Channell, *141] in his summing up, laid down the law to be, that, in the case of letters, the paper at least becomes the property of the person receiving them. So far as concerns the "copyright," it may be that that is in the writer. But it is a very different question whether the property in the letters passes to the person to whom they are addressed. In many matters of business, it is of the highest importance that the receiver of the letter should have the right to keep it. We are of opinion that the learned Judge laid down the law correctly when he told the jury that the property at least in the paper was in the receiver. Then the question of fact was, whether the letters had been given back by the plaintiff to the defendant so as absolutely to pass the property in them to him, or whether they were merely handed to the defendant as bailee for the plaintiff, with a duty to return them when demanded. The evidence as to that was extremely conflicting. That being so, it was for the jury to say to which side they gave credit; and, the learned Baron reporting to us that he is not dissatisfied with the conclusion they came to, we see no ground for interfering.

Rule refused.

In *Eyre v. Higbee*, 15 Howard's Practice Reports 45, the Supreme Court of New York held that the receiver of letters has a property qualified only by the writer's right to restrain their publication. Upon appeal (22 Id. 198), it was decided that though letters without literary value pass to the executor or administrator of the receiver, yet they are not *assets* in his hands, and cannot be made the subject of sale or assignment by him. They belong to widow or next of kin. As to question of "copyright," see *Woolsey v. Judd*, 4 Duer (N. Y.) 379 (1855), s. c., 11 Howard's Practice Reports 49, where the cases are reviewed and elaborately discussed.

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*HOEY v. FELTON. Nov. 18.

The defendant caused the plaintiff to be apprehended upon an unfounded charge, and to be detained from $\frac{1}{2}$ past 1 until 2 o'clock. In support of a claim for special damage in an action for false imprisonment, the plaintiff proved that he would have been engaged as a journeyman by one J. S., if he had presented himself at the factory at 2 o'clock on the day in question; but that, being unwell from the treatment he had received, he went home, and did not go to the factory until the next morning, when he found that his intended employer had engaged another man:—

Held, that this damage was too remote.

THIS was an action for false imprisonment and for slander. The cause was tried before Willes, J., at the first sitting in London in this term. The facts were as follows:—The plaintiff, who was a cigar-maker, at half-past one o'clock on the day in question went to the defendant's shop for refreshment, in payment for which he tendered a piece of money which was found to be bad; and thereupon the defendant used the slanderous words alleged in the second count, and ultimately gave him into custody, and detained him for half an hour,

which was the charge contained in the first count. The special damage alleged in the declaration was, that, by reason of the imprisonment and of the speaking of the words, the plaintiff had lost an engagement as journeyman to a cigar manufacturer.

In support of this allegation of special damage, *Thomas*, Serjt., on behalf of the plaintiff, tendered evidence to show, that the plaintiff was engaged as journeyman at a cigar manufactory, where he should have presented himself at two o'clock; but that he was so unwell in consequence of the treatment he had received at the hands of the defendant, that he was obliged to go home; and that, on presenting himself at the factory on the following morning, he found that his intended employer had taken another man, and consequently he lost his engagement.

On the part of the defendant it was objected that this was too remote a damage: and so the learned Judge ruled,—likening the case to that of a farrier who in shoeing a traveller's horse so unskilfully drove a nail into the hoof as to lame the animal, whereby his owner was unable to reach the house of a relative in time, and so lost a legacy: and accordingly the evidence was rejected. [*143]

A verdict was found for the plaintiff, damages 20s., on the first count, and 10s. on the second.

Thomas, Serjt., on a former day in this term, moved for a new trial, on the ground that the evidence of special damage was improperly rejected.—The loss of his engagement by the plaintiff was the immediate consequence of the wrongful acts of the defendant, and therefore the evidence as to the circumstances of that engagement was improperly rejected. [BYLES, J.—The rule is laid down with tolerable accuracy by Pollock, C. B., in *Rigby v. Hewitt*, 5 Exch. 240,† thus,—“Generally speaking, where an injury arises from the misconduct of another, the party who is injured has a right to recover from the injuring party for all the consequences of that injury. I am, however, disposed not quite to acquiesce to the full extent in the proposition that a person is responsible for all the possible consequences of his negligence. I wish to guard against laying down the proposition so universally: but of this I am quite clear, that every person who does a wrong is at least responsible for all the mischievous consequences that may reasonably be expected to result, under ordinary circumstances, from such misconduct.(a)] In *Hartley v. Herring*, 8 T. R. *130, in an action for consequential damage from slander imputing incontinence to the plaintiff, it was held to be enough to [*144] state that he was employed to preach to a dissenting congregation at a certain licensed chapel situated at A.; that he derived considerable profit from his preaching; and that, by reason of the scandal, persons

(a) In *Greenland v. Chaplin*, 5 Exch. 243, 248,† the same learned judge says,—“It occurs to me there is considerable doubt,—and at present I guard myself against being supposed to decide with reference to any case which may hereafter arise; but, at the same time I am desirous that it may be understood that I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen and which no reasonable person would have anticipated. Whenever that case shall arise, I shall certainly desire to hear it argued, and to consider whether the rule of law be not this, that a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur.”

frequenting the chapel had refused to permit him to preach there, and had discontinued giving him the profits which they usually had and otherwise would have given,—without saying who those persons were, or by what authority they excluded him, or that he was a preacher duly qualified according to the 10 Ann. c. 2. It can hardly be said that the damage there was not less remote than that in the present case. So, in *Ingram v. Lawson*, 6 N. C. 212 (E. C. L. R. vol. 37), 1 Scott 471, a statement in a newspaper that a ship of which the plaintiff was owner and master, and which he had advertised for a voyage to the East Indies, was not a seaworthy ship, and that Jews had bought her to take out convicts,—was held to be a libel on the plaintiff in his trade and business, for which he might recover damages, without proof of malice or allegation of special damage. [ERLE, C. J.—In both those cases the damage,—the loss of congregation in the one, and of passengers in the other,—was the proximate consequence of the slanderous statement. But how can the loss of an anticipated engagement be said to be the natural and proximate consequence of the acts of *145] this *defendant?] In *Archer v. Williams*, 2 Car. & K. 26 (E. C. L. R. vol. 61), which was an action for the wrongful detention of railway scrip, whereby the plaintiff had been damnified from the fluctuation of the market, and was deprived of the means of paying up his deposits, which would have entitled him to claim an allotment of one hundred other shares,—Cresswell, J., directed the jury that “the measure of damages is, the highest sum the scrip could have been sold for from the time of the detention till the time it was returned. The plaintiff is entitled to the full amount. A wrongdoer cannot be let off with less than that. The very point had arisen in a recent case at Liverpool, where some corn had been detained by the officers of the customs. As for the loss sustained by the plaintiff from the non-allotment of the one hundred shares, he cannot obtain damages for that; it is too remote.” [BYLES, J.—The fluctuation of the share-market may well be considered to be the ordinary and accustomed state of things.] He also referred to *Sedgwick on Damages*, 2d edit. 80, et seq. *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the Court:(a)—

In this case, Serjeant *Thomas* moved for a rule nisi for a new trial, on the ground of the improper rejection of evidence. The plaintiff in the count for false imprisonment showed that the defendant imprisoned him about half past one o'clock, and detained him till after two o'clock: and for special damage he tendered evidence to show that he would have been taken into the employ of a cigar manufacturer if he *146] had appeared at two o'clock at the factory; but, being unwell in consequence of the imprisonment, he had returned to his home, and, on applying at the factory on the following morning, found that the place was filled up. The judge decided that this damage was too remote, and rejected the evidence.

My Brother *Thomas* contended that it was not too remote: and he referred to some cases; as, where a minister was allowed to show that his congregation had diminished by reason of the slander of the defendant,—*Hartley v. Hemming*, 8 T. R. 1; and where the captain of a passenger ship showed that he had lost passengers by the defendant's

(a) The only judges present at the argument were Erle, C. J., and Byles, J.,—Williams, J., and Keating, J., being engaged in the Court of Criminal Appeal.

description of his ship,—*Ingram v. Lawson*, 6 N. C. 212 (E. C. L. R. vol. 37), 8 Scott 471, and other cases.

In these cases, the damage was the proximate result of the defendant's wrong. In the present case, we think it was too remote. The damage does not immediately, and according to the common course of events, follow from the defendant's wrong: they are not known by common experience to be usually in sequence. The wrong would not have been followed by the damage, if some facts had not intervened for which the defendant was not responsible. Thus, there was the act of the plaintiff, who returned home instead of going to the factory and explaining: and, although it was said he was unwell by reason of the imprisonment, it was not suggested that he was so unwell as to be unable to go. There was also the act of the intended employer, changing his purpose in respect of the plaintiff, and making an engagement with another person.

In *Vicars v. Wilcocks*, 8 East 1, the defendant was held not liable either for the wrongful act of a third party, or the arbitrary choice of a fourth party detrimental to the plaintiff, but not proximately caused by the defendant's wrong. In *Boyce v. Bayliffe*, 1 Campb. 58, the defendant imprisoned the plaintiff at the Cape of Good Hope, and the plaintiff transhipped himself at St. Helena for 100*l.* for England, rather than continue in the ship with the captain who had imprisoned him: but the damage of 100*l.* was held to be too remote, arising from an act of the plaintiff too remote in time and place from the defendant's wrong: and there the case of the midshipman who by being detained on shore alleged that he had lost the lieutenantancy which he would have gained if he had been afloat, was referred to by Lord Ellenborough as an example of too great remoteness. The subject of remoteness of damage is considered, and the cases thereon are collected and arranged in Mr. Maine's *Treatise on Damages*, p. 14, et seq., with clearness and force; and we refer thereto in support of our judgment.

Rule refused.(a)

(a) *Gibbons* (who was with *Thomas*, Serjt.) on a subsequent day applied for leave to appeal; but the Court said they did not think it a fit case for an appeal.

Selden, J., speaking of damages from breaches of contract where the same principle applies, says: "In such cases, the damages sustained are disallowed, not because they are uncertain, nor because they are merely consequential or remote, but because they cannot be fairly considered as having been within the contemplation of the parties at the time of entering into the contract.

Hence the objection is removed, if it is shown that the contract was entered into for the express purpose of enabling the party to fulfil his collateral agreement, or perform the act supposed." He accordingly held

that damages which consist in the loss of the use of the very article which defendant agreed to construct, may be recovered. Thus average rent for the use of machinery, whose operation was suspended by delay in building a steam-engine, was recoverable: *Griffin v. Colver*, 2 Smith (N. Y. Court of Appeals) 489; also *Wade v. Haycock*, 1 Casey (Pa.) 382; *Reany v. Culbertson*, 9 Harris (Pa.) 507. And a carrier is liable for the amount of premium which plaintiff proves he would have won, had his plans and specifications been forwarded to their destination in time for competition: *Adams Express Co. v. Egbert*, 12 Casey (Pa.) 360.

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*GOODING v. BRITNALL. Nov. 22.

A certificate in the following words,—“I certify that the trespass or grievance in respect of which this action was brought was not wilful or malicious,”—is of no avail to deprive a plaintiff of costs under the 34th section of the Common Law Procedure Act, 1860.

The judge has no power to certify under the statute, where a right, though a small one, is really in issue.

THIS was an action for breaking and entering land of the plaintiff at Clapton, in the parish of Hackney, in the county of Middlesex, and ejecting the plaintiff therefrom, and destroying his French beans thereon growing.

The defendant pleaded not guilty, and that the land was not the land of the plaintiff, whereupon issue was joined.

At the trial before Erle, C. J., at the sitting in Middlesex after last term, the plaintiff succeeded in establishing a tenancy at will, and that he had been forcibly expelled without notice. The jury thereupon returned a verdict for him with 40s. damages; and his Lordship certified under the 34th section of the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126,(a) as follows:—

“I certify that the trespass or grievance in respect of which this action was brought was not wilful *or* malicious.”

*149] Application having been made to Erle, C. J., to *rescind his certificate on the ground that it had been improvidently made, his Lordship referred the matter to the court.

David Keane now moved for a rule to show cause why the plaintiff should not have his costs notwithstanding the certificate, which, he submitted, the Lord Chief Justice had no power to grant, the title to the land having been in question. To be of any avail, the certificate under this act must be made immediately after the verdict is pronounced: nothing which may influence his mind is to intervene between the trial and the giving of the certificate. The certificate is to contain three distinct allegations,—first, that the action was not really brought to try a right besides the mere right to recover damages,—secondly, that the trespass or grievance in respect of which the action was brought was not wilful *and* malicious,—and, thirdly, that the action was not fit to be brought. Unless the certificate can negative all these, it is of no avail: *Saunders v. Kirwan*, 10 C. B. N. S. 514 (E. C. L. R. vol. 100). Here, the Lord Chief Justice could not negative that the action was brought to try a right: it was brought to try whether or not there was a valid tenancy.

Gordon Allen showed cause in the first instance.—[ERLE, C. J.—I could not certify that the action was not really brought to try a right, though I considered it one of so shadowy a kind that the plaintiff was not entitled to costs if I could deprive him of them.] If, as was held

(a) Which enacts, that, “when the plaintiff in any action for an alleged wrong, in any of the superior courts, recovers by the verdict of a jury less than 5*l.*, he shall not be entitled to recover or obtain from the defendant any costs whatever in respect of such verdict, whether given upon any issue or issues tried, or judgment passed by default, in case the judge or presiding officer before whom such verdict is obtained shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was not really brought to try a right besides the mere right to recover damages, and that the trespass or grievance in respect of which the action was brought was not *wilful and malicious*, and that the action was not fit to be brought.”

in *Saunders v. Kirwan*, it is unnecessary that the certificate should negative wilfulness as well as malice, neither can it be necessary to negative the other matters. The object of the statute was to prevent frivolous actions. [KEATING, J.—How can an action be said to be frivolous when it is brought to try a right?]

*ERLE, C. J.—We are all of opinion that the plaintiff is entitled to costs in this case, and that my certificate is of no avail [*150 to deprive him of them. We must give effect to the plain language of the statute. The plaintiff is to have no costs if the Judge certifies,—that the action was not really brought to try a right besides the mere right to recover damages,—that the trespass or grievance in respect of which the action was brought was not wilful and malicious,—and that the action was not fit to be brought. The statute requires that these three things shall be certified. On the present occasion, I could not certify that the action was not brought to try a right, small though that right might be. When I gave the certificate in its present form, I was not reminded of the decision in *Saunders v. Kirwan*, which I consider to be perfectly correct.

WILLIAMS, J.—I am entirely of the same opinion. The 34th section of the Common Law Procedure Act, 1860, only impowers the Judge to deprive the plaintiff of costs upon a verdict for less than 5*l.* in an action for an alleged wrong, when he can grant a certificate negating three things, viz., that the action was really brought to try a right besides the mere right to recover damages,—that the trespass or grievance in respect of which the action was brought was wilful and malicious,—and that the action was fit to be brought. Unless all these three things are negated, the certificate avails nothing. And here my lord tells us that he could not negative the first, because the action *was* really brought to try a right. The principle upon which the case of *Saunders v. Kirwan* was decided was this, that, where the Judge by his certificate affirms the first and third propositions contained in the statute, it is enough if in dealing with the second he negatives *either wilfulness or malice, because, if either be [*151 negated, it could not be said that the trespass or grievance *was* wilful *and* malicious. If the certificate negatives either quality, it negatives both.

BYLES, J.—I am of the same opinion. To make the certificate available to deprive the plaintiff of costs, three propositions must be stated therein,—that the action was not really brought to try a right besides the mere right to recover damages,—that the trespass or grievance in respect of which the action was brought was not wilful and malicious,—and that the action was not fit to be brought. In Lord Denman's Act, 3 & 4 Vict. c. 24, s. 2, the words were affirmative: the Judge was to certify (in order to give the plaintiff costs) that the action *was* really brought to try a right besides the mere right to recover damages for the trespass or grievance for which the action was brought, or that the trespass or grievance in respect of which the action was brought *was* wilful and malicious. If "and" were changed into "or," the certificate under that statute would be insufficient. But here, under this statute, the words being in the negative, it is not necessary to negative both wilfulness and malice in order to sustain the second

proposition. Each of the three must, however, appear in the certificate.

KEATING, J., concurred.

ERLE, C. J.—The Court having decided the question which I referred to them, the record will stand as if there were no certificate. We only decide that the certificate must embrace all three of the propositions stated; but we by no means intend to decide that the power *152] of the Judge to certify is taken away where the *action is brought in respect of a mere nominal invasion of a right.

WILLIAMS, J.—I for one certainly do not mean to say that the power of certifying is taken away by the mere setting up of a claim of right.
Rule accordingly.

THE DANUBE AND BLACK SEA RAILWAY AND KUSTENDJIE HARBOUR COMPANY (Limited) v. XENOS.

XENOS v. THE DANUBE AND BLACK SEA RAILWAY AND KUSTENDJIE HARBOUR COMPANY (Limited). Nov. 21.

Where two parties enter into a contract which is to be performed at a future day, and, before the day for performance arrives, one of them gives the other notice that he does not hold himself bound by it, the other is at liberty to treat such renunciation as a breach of the contract, without waiting the arrival of the day fixed for its performance.

On the 9th of July, A., by his agent, agreed to receive certain goods of B. on board his ship to be carried to a foreign port,—the shipment to commence on the 1st of August. On the 21st of July, A. wrote to B. stating that he did not hold himself responsible for the contract, the agent having no authority to make it; and on the 23d he wrote again offering a substituted contract, but still repudiating the original contract. B. by his attorneys gave A. notice that he should hold him bound by the original contract, and that if he persisted in refusing to perform it, he (B.) should forthwith proceed to make other arrangements for forwarding the goods to their destination, and look to him for any loss. On the 1st of August A. again wrote to B. stating that he was then prepared to receive the goods on board his ship, making no allusion to the original contract. B. had, however, in the meantime entered into a negotiation with one S. for the conveyance of the goods by another ship, which negotiation ended in a contract for that purpose with S. on the 2d of August. B. thereupon sued A. for refusing to receive the goods pursuant to his contract; and A. brought a cross-action against B. for refusing to ship.

Upon a special case stating these facts:—Held, that it was competent to A. to treat B.'s renunciation as a breach of the contract; and that the fact of such renunciation afforded a good answer to the cross-action of A., and sustained B.'s plea that before breach A. discharged him from the performance of the agreement.

THESE were cross-actions. The declaration in the first-mentioned action stated, that, by an agreement made between the plaintiffs and the defendant, it was agreed that the defendant's ship, called *The Mavrocordatos*, should load from the plaintiffs in the Victoria Docks, London, certain rolling stock, plant, and materials, and should convey the same from London to Kustendjie for freight; and that the ship- *153] ment should commence on the 1st of August, 1860; and that *though the plaintiffs were willing to perform the contract, the defendant, before the 1st of August, refused to perform it or to receive the goods, and gave notice to the plaintiffs to that effect: whereby the plaintiffs were discharged from the performance of the agreement, and obliged to charter another vessel to convey the goods at an increased freight, and had incurred extra expenses.

The defendant by his pleas denied the agreement, the readiness and

willingness of the plaintiffs to perform it, and the alleged breaches; and further pleaded, that, before breach, the plaintiffs exonerated and discharged him from the performance of the contract. Issue thereon.

In the secondly-mentioned action, the declaration alleged that it was agreed between the plaintiff and the defendants that the plaintiff's steamship *The Mavrocordatos* should load from the defendants in the Victoria Docks, London, certain rolling stock, plant, and materials, and should convey the same from London to Kustendjie for certain freight and hire payable by the defendants, and that the shipment should commence on the 1st of August, 1860; and that, if from the default of the defendants, the shipment should not commence on that day, and continue regularly till completed, the defendants should pay the sum of 30*l.* as liquidated damages for each day lost through such default. It then alleged, that, though the plaintiff had done all things necessary to entitle him to have the said cargo loaded on board his said ship according to the said agreement, the defendants made default in shipping the said cargo, whereby the plaintiff lost the hire and freight he would have earned had the said cargo been shipped; and that the said shipment was not commenced on the 1st of August; and that five days were lost by default of the defendants, whereby *the defendants became liable to pay 150*l.* as liquidated damages, at the rate of 30*l.* per day. [*154

The defendants in this action pleaded,—first, that it was not agreed as alleged,—secondly, that, before breach, the plaintiff exonerated and discharged the defendants from their said agreement, and the performance of the same,—thirdly, that they were ready and willing to ship the cargo according to their contract, but that the plaintiff was not ready and willing to receive the same according to his said contract,—fourthly, that they did not make default, as alleged,—fifthly, that it was not by the default of the defendants arising from causes over which they had control that the shipment was not commenced on the 1st of August, 1860, and thence continued regularly until the same was completed, as alleged. Issues thereon.

The first-mentioned cause came on for trial at the Middlesex sittings after Hilary Term last, when it was agreed that the following case should be stated for the opinion of the Court:—

The plaintiffs in the first-mentioned action are a Company incorporated in July, 1857, for the purpose of constructing and making a railway and harbour at Kustendjie, in European Turkey; and the defendant Mr. Xenos carries on business in London under the name of *The Greek and Oriental Steam Navigation Company*.

In the month of June, 1860, the Railway Company were desirous of shipping from London to Kustendjie a quantity of railway carriages, axles, springs, &c.; and Mr. Parkes, the secretary of the Company, had several interviews with Mr. Fitze, a clerk of Mr. Xenos, as to the terms upon which they could be conveyed by one of Mr. Xenos's steamers: and about the end of the month these parties on behalf of the Company and Mr. Xenos respectively, verbally agreed to terms which on *the 2d of July were embodied by Mr. Parkes in the following letter sent by him to Mr. Xenos:— [*155

"*The Danube and Black Sea Railway and Kustendjie Harbour Company, Limited.*

“Offices, 24, Abingdon Street, Westminster.

“2d July, 1860.

“Sir,—I beg to recapitulate the terms on which it has been arranged that you should convey the rolling stock, plant, and material for the Company to Kustendjie per S. S. Mavrocordatos. The particulars of the carriages are annexed, and the weights and dimensions therein given are to be considered as approximate only; but no larger or weightier packages than those which may compose these carriages are to be shipped. Not less than 900 tons to be shipped.

“1. That the ship shall load in the Victoria Dock, London, the cargo to be brought alongside at our risk and expense, and thence taken on board by you at ship's risk and expense:

“2. That the shipment shall commence on the 1st of August; and, should it happen, that, by any default of the railway Company, arising from causes over which they have control, the shipment is not commenced on that day, and thence continued regularly till the same is completed, they are to pay the sum of 30*l.* as liquidated damages for each complete period of a day lost through such default in commencing and continuing the shipment:

“3. That the ship shall sail immediately on the completion of the shipment of our cargo, or so soon after as the ship can be cleared at the Custom House; or, in default, a like daily penalty as provided in the last clause is to be paid by your Company to the railway Company:

“4. That the railway Company shall receive their cargo at Kustendjie from the ship's tackles into boats *or lighters provided
*156] at their expense over the steamer's side:

“5. That your Company undertake to deliver the said cargo over the ship's side into the boats or lighters with all possible despatch, and to provide all proper tackle, &c., for that purpose:

“6. That, for the purpose of aiding the crew, the captain is to receive on board at ship's expense such additional labour as the railway Company may from time to time, with the concurrence of the captain, choose to apply, and at the cost settled by them; it, of course, being understood that the railway Company do not make any profit out of the cost of the labour:

“7. The steamer is to anchor and discharge the cargo as near to the quay at Kustendjie as her draught of water will permit: if compelled to leave that position by weather or otherwise, the discharge is to be suspended; but the steamer is to return to the anchorage indicated when and as the weather will permit, and so continue until the entire cargo belonging to the railway Company shall have been discharged:

“8. The railway Company undertake to keep continuously two lighters or large boats alongside the steamer, that is to say, one on each side, during such hours of the day and night as the captain may require; provided, but not otherwise, the wind and weather will permit such lighters or boats to proceed to the steamer and to lie alongside her and to receive such cargo with complete safety:

“9. That, if the railway Company make default in performance of article 8, they shall pay your Company, as liquidated damages, the sum of 30*l.* for each and every complete period of a day for which

they shall make default, your Company having on their part performed their engagement :

“ ‘ 10. Should any dispute arise as to whether the *Company have or have not made default under article 8, the same is to be settled forthwith on the spot by two referees chosen in writing, one by the railway Company, and the other by the captain, or by the arbitrator to be nominated by the referees before beginning the reference: [*157

“ ‘ 11. No demurrage penalty for detention or damage is to be recoverable from the Company under this agreement, other than the liquidated damage stipulated in articles 2 and 9.

“ ‘ 12. The ship's hatchways are guarantied of sufficient capacity to receive the cargo indicated approximatively in list rendered :

“ ‘ Four of the bodies to be carried on deck, if necessary :

“ ‘ Freight at the rate of 37s. 6d. per ton of 40 cubic feet or 20 cwt. at ship's option (except wheels and axles, which are to be taken at the dead weight at 45s. per ton of 20 cwt.), together with 10 per cent. primage, to be payable one half on ship's sailing, and the remainder on production at the railway Company's offices in London of a receipt for the correct delivery at Kustendjie of the goods as per bill of lading. Bills of lading to be in customary form. The ship to have liberty to call at Malta, Athens, and Constantinople, to land passengers and goods, which is to be accomplished with the utmost possible despatch.’

“ I shall be glad to have your approbation of above.

(Signed) “ FRANCIS J. PARKES, Secretary.”

“ To S. Xenos, Esq., Manager The Greek and Oriental Steam Navigation Company, Limited.”

On the 9th of July, Fitze wrote, on behalf of Mr. Xenos, and sent, the following letter to Mr. Parkes :—

“ We accept the terms contained in your letter of the 2d inst., for rolling stock, &c., to Kustendjie per Mavrocordatos. You can order the dead weight alongside the Mavrocordatos at your earliest convenience.”

*On the 16th of July, Mr. Parkes wrote to Mr. Fitze a letter, [*158 of which the following are extracts :—

“ I anticipate that a considerable portion of our cargo for the Mavrocordatos will be despatched from the country on Saturday, so that it is reasonable to expect that it will be alongside Monday or Tuesday.

“ I have told the various senders to direct the material to be delivered to the Mavrocordatos in the Victoria London Docks. I presume they should apply to you for a shipping order.”

On the 17th of July, Fitze replied, on behalf of Mr. Xenos, as follows :—

“ We have your esteemed favour of yesterday, and contents are noted. Please direct the senders of material to apply to us for shipping orders: and you will be so good as give us particulars for Customs clearance. We require the dead weight first. Please give us the numbers of the packages you wish to go below, in preference to the others.”

On the 19th of July, Mr. Parkes wrote to Mr. Fitze a letter of which the following is an extract :—

"I have every reason to expect that a large portion of our material will be in London on Monday."

To which, on the 20th of July, the said Mr. Parkes received the following reply by Fitze on behalf of Mr. Xenos.

"We have your favour of yesterday. Contents are noted. We sincerely trust that the dead weight will be alongside first, as we cannot put on board the light goods until the heavy portion is on board."

On the 20th of July, Mr. Parkes called at the office of Mr. Xenos with a list of a portion of the materials which it was expected would be alongside the steamer ready for shipment on the following Monday. He then saw Mr. Xenos and Mr. Fitze; and some discussion took place as to the terms contained in the letter *of Mr. Parkes of the 2d of July. Mr. Xenos expressed his dissatisfaction with the agreement, which he denied Mr. Fitze's authority to sign on his behalf; and said, that, if the plaintiffs sent their goods, he should tell his captain not to take them on board.

For the purposes of this case, however, the authority of Mr. Fitze to write the letter of the 9th of July, 1860, and the other letters set out in the case, on behalf of Mr. Xenos, is to be taken as admitted.

On leaving the defendant's office, Mr. Parkes brought with him the above-mentioned list of materials; and, on the same day, he returned it to Mr. Fitze in the following letter:—

"I enclose list of a portion of material to be shipped by the steamship Mavrocordatos to Kustendjie on account of this Company, I have reason to expect that this material will be alongside some time on Monday, as it was despatched yesterday from the country. Please give the necessary directions on the subject.

"P. S. I have instructed Mr. Thomas Fowler, of 53, Dempsey Street, Stepney, to take an account of our cargo as it is shipped, and to check the measurements on our behalf."

On the same day, Mr. Xenos wrote and sent the following letter to the Company:—

"Gentlemen,—On the 9th instant, I find that Mr. Fitze, a clerk in my employ, concluded a certain contract with you for the carriage of certain goods by my steamer Mavrocordatos, for which I have now to inform you I do not hold myself responsible, as he has no power so to act in my name, or to sign any document on my behalf."

The Company were desirous to open their proposed railway as early as possible, of which Mr. Fitze had notice before the 9th of July, 1860: and it was important to the Company that the rolling stock and materials *the subject of the above agreement should be despatched without delay. They therefore consulted their solicitors as to the course they should pursue; and the latter on the 23d of July wrote and sent the following letter to Mr. Xenos:—

"Sir,—We are instructed by The Danube and Black Sea Railway and Kustendjie Harbour Company, Limited, to acknowledge the receipt of your letter to them of the 21st instant, and to intimate to you on behalf of the Company that they consider the contract for the conveyance of rolling stock, &c., for them to Kustendjie per Mavrocordatos binding upon you; that the Company are ready to perform their part of the agreement; and that, if you persist in your refusal

to perform the same on your part, they will hold you responsible for all loss, damages, and expenses that may ensue.

"You have already been informed by the secretary that a large portion of the material is in or on its way to London, ready for shipment; and, as delay is out of the question, you will please to understand, that, unless we receive from you by 1 o'clock to-morrow (Tuesday) a withdrawal of your letter of the 21st instant, the Company will conclude that you intend to persist in refusing to perform the agreement, and will forthwith proceed to make other arrangements for sending out the material."

On the same day Mr. Xenos replied as follows:—

"Gentlemen,—In answer to your letter of this day, I beg to say that no contract was ever concluded between me and the Danube and Black Sea Railway and Kustendjie Harbour Company, Limited, but only agreed in a preliminary way between Mr. Fitze, my clerk, and those gentlemen, to pay 37s. 6d. freight, with 10 per cent. primage, on a certain quantity of goods not less than 700 tons. To that price I consented, but with the understanding, that, before receiving them on board, there should be drawn up between me and them a [*161 regular charter-party or contract with all the clauses regarding the payment of freight, B/ lading, days of loading and discharging, and in the form of my printed contracts, one of which I herewith enclose you. For this I shall wait till to-morrow at 4 o'clock for the Danube Railway Company to sign; and I give you notice that the Mavrocordatos is now preparing for Patras, and will leave immediately for that port in case of their refusal."

The following is a copy of the document enclosed in this letter:—

"London, 19 London Street.

"It is this day mutually agreed between The Greek and Oriental Steam Navigation Company, S. Xenos, owner, of London, and M——, of ——, that M—— engages to ship and Mr. Xenos engages to take on board the ship or steamer Mavrocordatos, Captain Hough, of the burthen of —— tons, lading in the Victoria Dock, and bound for Kustendjie, calling at Malta, Athens, and Constantinople, to sail on the ——, the following goods, weight or measurement, steamer's option,—

"Not less than 900 tons of machinery, according to a certain specification.	<table border="0"> <tr> <td data-bbox="577 1226 770 1256">Rate of freight,</td> <td data-bbox="806 1226 948 1256">Primage.</td> </tr> <tr> <td data-bbox="577 1256 770 1285">37s. 6d.</td> <td data-bbox="806 1256 948 1285">10s. per cent.</td> </tr> </table>	Rate of freight,	Primage.	37s. 6d.	10s. per cent.
Rate of freight,	Primage.				
37s. 6d.	10s. per cent.				

"The freight payable in London on delivery of bills of lading, free of interest or commission.

"The goods to be alongside the ship or steamer at least two days before sailing, otherwise Mr. Xenos will not be responsible if the goods are left out.

"The bills of lading must be sent to the office of Mr. Xenos, 19 London Street, at least two days before sailing, for signature, and to be of The Greek and Oriental Steam Navigation Company's form.

"*Mr. S. Xenos is not responsible for any average breakage [*162 or leakage that may happen to the said goods in the passage of the said vessel from London to her destination, by heavy weather, or the pitching or rolling of the vessel.

"For machinery and all other large packages the measurement
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must be taken in the presence of the shipper's Custom-House agent or his clerk and Mr. S. Xenos's clerk, otherwise the freight will be charged on Mr. S. Xenos's measurement; and no remeasurement to be taken at the port of discharge.

"The steamer to be discharged within seven running days, at the risk and expense of the merchants, merchants paying all labour.

"Not less than 900 tons of merchandise according to the specification given to Mr. S. Xenos: each package must not measure more than can be taken below in the hold of the steamer: and nothing to be taken on deck, except with the consent of the underwriters; the Danube Railway Company paying any extra premium the underwriters may ask for the ship and cargo."

On the 24th of July, the Company's solicitors wrote and sent Mr. Xenos the following letter:—

"Sir,—We beg to acknowledge receipt of your letter of yesterday, and in reply to state that our clients decline to sign any other agreement than the one already concluded between them and Mr. Fitze on your behalf, and which contains clauses regarding the payment of freight, bills of lading, days of loading and discharging, &c., totally different from the document enclosed in your letter.

"As you still persist in disavowing the contract, our clients have no alternative but to make other arrangements forthwith, holding you responsible for the consequences, as stated in our letter of yesterday."

*163] On the 23d, 24th, and 25th of July, the Company *gave directions to Messrs. Pickford & Co., to the manager of the goods department at the King's Cross station, to the manager of the goods department of the Blackwall station of the Eastern Counties Railway, and to the superintendent of the Victoria Docks, respectively, that the said stock was not to be shipped on board the *Mavrocordatos*. These directions were given by the Company in consequence of Mr. Xenos's letter to them of the 21st of July.

On the 24th of July, after the receipt by the Danube Company's solicitors of Mr. Xenos's letter of the 23d of July, steps were taken by the Company with the view of sending out their rolling stock by another steamer. A negotiation was entered into with this object by Mr. Parkes on behalf of the Company with Messrs. Smith, Sundries & Co., of London. On the 24th, 25th, and 27th of July, the terms upon which Messrs. Smith & Co. were willing to take out the rolling stock were discussed between them and Mr. Parkes; and on the last-mentioned day they were in substance verbally agreed upon in a conversation between them and Mr. Parkes. On the 28th of July, a letter of that date was written by Mr. Parkes to Messrs. Smith & Co., stating his understanding as to the terms which had been in substance come to on the 27th of July. On the 1st of August, Messrs. Smith & Co. wrote to Mr. Parkes a letter of that date stating in detail the terms upon which they were willing to carry out the rolling stock. This letter, which was received by Mr. Parkes after the receipt by him of Mr. Xenos's letter of the 1st of August, did not, however, contain a simple acceptance of the terms mentioned in Mr. Parkes's letter of the 28th of July, but varied from those terms, not in substantial matters relating to freight, but in some details with reference to dates and

other matters. Mr. Parkes, on the 2d of August, *and after the receipt by him of Mr. Xenos's letter of the 1st of August, [*164 wrote to Messrs. Smith & Co. finally accepting the contract in the form stated in their letter of the 1st of August; and under this contract the rolling stock was afterwards shipped and sent to Kustendjie in a steamer belonging to Messrs. Smith & Co.

Mr. Xenos had no further notice of these negotiations than as appears on the correspondence.

On the 27th of July, 1860, Mr. Xenos addressed the following telegram to the superintendent of the Victoria Docks, where the Mavrocordatos was lying:—

"Why do you not go on shipping the goods of the Danube and Black Sea Railway Company by the Mavrocordatos? Reply immediately: party waiting very urgent."

To this he received the following reply,—

"Because we have an order from Mr. Parkes, the secretary of the Danube and Black Sea Railway Company, not to ship; and we have also similar orders from the various railway companies who brought the goods to the docks."

The Company had no further notice of these telegrams than as appears on the correspondence.

On the 1st of August, Mr. Xenos wrote the following letter to Mr. Parkes:—

"Sir,—We applied for your goods for shipment per S. S. Mavrocordatos on the 27th ultimo, but were informed by the Victoria Dock Company that you had ordered all goods to be struck, and not shipped without further orders from you. We now beg to give you notice that we are prepared to receive your rolling stock per Mavrocordatos to-day, and we will beg of you to give orders to the dock company accordingly immediately, as the steamer must load forthwith. Waiting your reply per bearer, we are," &c.

*This letter was delivered at the office of the Company on the 1st of August at 3 P. M.; and, on the following day, Mr. [*165 Parkes replied to it as follows:—

"Sir,—I have to acknowledge the receipt of your letter of yesterday. I do not, however, understand this communication under existing circumstances; and I can only refer you to the correspondence lately passed between you and this Company or their solicitors.

"This Company have, however reluctantly, been compelled to act on the notice given to you. Arrangements for the conveyance of the rolling stock, &c., to Kustendjie have been made in other quarters; and we shall have to look to you for reimbursement of the heavy loss which is likely to result."

On the 3d of August, Mr. Xenos wrote and sent the following letter to the Company:—

"Gentlemen,—I received your letter of the 2d instant, and am surprised at its contents after the last communication I had from your solicitors. In order to avoid any collision, I gave orders to the captain of the S. S. Mavrocordatos to receive on board what stuff was alongside the steamer, and I applied to the Victoria Dock Company for that. They replied that they had orders to stop shipment. However, as you clearly break the contract (because it was agreed the

freight to be at 37s. 6d. and 10s. per cent. prime, as per contract which I hold, and we only differed in the mode of discharging, I give you notice that I shall proceed at once against you for dead freight and demurrage. The Mavrocordatos is now ordered to proceed in ballast to the Mediterranean, and you have to bear the consequences of not fulfilling your contract."

On the 24th of August, Mr. Xenos commenced his said action against the Company. The amount of the loss sustained by the Company for the goods not *having been taken by the Mavrocordatos was not computed till the end of November, 1860, upon the return of Mr. Parkes from abroad, when it was demanded of Mr. Xenos, and payment was refused.

The questions for the opinion of the Court, are,—First, whether the plaintiffs in the first-mentioned action are entitled to recover. If the Court shall be of opinion that they are so entitled, it is agreed that final judgment shall be signed for them in the sum of 350*l.* and costs. If the Court shall be of a contrary opinion, judgment in the first-mentioned action shall be signed for the defendant.

Secondly, whether the plaintiff in the secondly-mentioned action is entitled to recover. If the Court shall be of opinion that he is so entitled, it is agreed that final judgment shall be signed therein for him for such a sum as J. S. shall award, with costs. If the Court shall be of a contrary opinion, judgment in the secondly-mentioned action is to be signed for the defendants.

Mellor, Q. C. (with whom was *Couch*), for the plaintiffs.(a)—The *167] Company were warranted in treating *the defendant's letter of the 21st of July, 1860, repudiating the authority of his clerk Fitze, as a renunciation of the contract contained in the letters of the 2d and 9th. The authorities are uniform, that, where one of the parties to a contract gives notice to the other before the arrival of the day for its performance that he will not hold himself bound by it, the latter is justified in treating that notice as a renunciation and discharge of his obligation. If that be so, it puts an end to both actions. But, assuming, that, notwithstanding such notice, the party may retract his renunciation at any time before the day fixed for the performance of

(a) The points marked for argument on the part of the Company were as follows:—

"That they are entitled to succeed in the action in which they are plaintiffs, and are not liable in the action in which they are defendants, for the following amongst other reasons:—

"1. That the letters of Xenos of the 21st and 23d of July, 1860, set out in the case, amount to a refusal by him to perform the contract entered into between him and the Company by the letters of the 2d and 9th of July set out in the case:

"2. That such refusal entitled the Company to enter into an engagement with other parties for the shipment of their goods, and to charge Xenos with any loss which might arise from his breach of contract:

"3. That a contract for such shipment was substantially entered into between the Company and Messrs. Smith & Co., on the 27th of July, 1860; and that the Company were justified in reducing that contract into a more formal shape by their correspondence with those parties, after the receipt of Xenos's letter of the 1st of August, 1860:

"4. That the last-mentioned letter was sent by Xenos too late to affect the position of the Company, or to relieve them from the consequences of his previous refusal to perform his contract:

"5. That the said letter did not amount to an offer by Xenos to perform his contract, but merely stated that he was prepared to receive the Company's rolling stock per Mavrocordatos:

"6. That the letter did not bind Xenos to receive such stock on the terms of the contract contained in the letters of the 2d and 9th of July: and the Company were therefore justified in disregarding it."

the contract, there has been no such retraction here. In *Cort v. The Ambergate, Nottingham and Boston, and Eastern Junction Railway Company*, 17 Q. B. 127 (E. C. L. R. vol. 79), it was held, that, on a contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods, gives notice to the vendor not to manufacture any more, as the purchaser has no occasion for them, and *will not accept or pay for them, the vendor having been [*168 desirous and able to complete the supply, the latter may, without manufacturing or tendering the rest of the goods, maintain an action against the purchaser for breach of the contract; and that proof of such notice by the purchaser will entitle the plaintiff to recover, on a count alleging that he was ready and willing to perform the contract, and that the defendant refused to accept the residue of the goods, and prevented and discharged the plaintiff from supplying them, and from further executing the contract. In *Hochster v. De la Tour*, 2 Ellis & B. 678 (E. C. L. R. vol. 75), the plaintiff declared on an agreement to employ him as a courier from a day subsequent to the date of the writ; averring that the plaintiff, from the time of the agreement till the refusal by the defendant after mentioned, was ready and willing to perform his part of the contract; and alleging for breach, that, before the day for the commencement of the employment, the defendant refused to perform the agreement, and discharged the plaintiff from performing it, and wrongfully put an end to the agreement. Upon motion in arrest of judgment, it was held that a party to an executory agreement may, before the time for executing it, break the agreement either by disabling himself from fulfilling it, or by renouncing the contract; and that an action will lie for such breach before the time for the fulfilment of the agreement; that it sufficiently appeared on the face of the declaration that there was on the part of the defendant, not merely an intention to break the contract, of which intention he might repent, but a renunciation communicated to the plaintiff, on which the plaintiff was entitled to act; and consequently that the plaintiff was entitled to judgment. "It seems strange," said Lord Campbell, "that the defendant, after renouncing the contract, and *absolutely declaring that he will never act under it, should [*169 be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind." The only ground upon which that decision has since been questioned, is, that there was nothing to show that the plaintiff had acted upon the renunciation. The case was deliberately reconsidered by the Court of Queen's Bench in *Avery v. Bowden*, 5 Ellis & B. 714, 728 (E. C. L. R. vol. 85), where Lord Campbell says: "According to our decision in *Hochster v. De la Tour*, to which we adhere, if the defendant, within the running-days, and before the declaration of war, had positively informed the captain of *The Lebanon* that no cargo had been provided or would be provided for him at Odessa, and that there was no use in his remaining there any longer, the captain might have treated this as a breach and renunciation of the contract; and thereupon, sailing away from Odessa, he might have loaded a cargo at a friendly port from another person, whereupon the plaintiff would have had a right to maintain an action on the charter-party to recover damages equal

to the loss he had sustained from the breach of contract on the part of the defendant." In *Avery v. Bowden*, the renunciation,—or that which was relied upon as such,—was not acted upon. In *Goodman v. Pocock*, 15 Q. B. 576, 583 (E. C. L. R. vol. 69), which was an action by a clerk for a wrongful dismissal in the middle of a quarter, Erle, C. J., says: "The plaintiff had the option either to treat the contract as rescinded, and sue for his actual service, or to sue on the contract for the wrongful dismissal." *Elderton v. Emmens*, 6 C. B. 160 (E. C. L. R. vol. 60), affirmed in *Dom. Proc.*, *Emmens v. Elderton*, 13 C. B. 495 (E. C. L. R. vol. 76), 4 House of Lords Cases 624, is an authority to the same effect.

Bovill, Q. C. (with whom was *Honyman*), for the *defendant.(a)—The plaintiffs cannot be said to have acted upon the defendant's alleged renunciation of the contract until they had entered into a binding contract for the conveyance of their goods to the Black Sea with Messrs. Smith & Co., and that was not until the 2d of August, which was after the plaintiffs received notice from the defendant that he was ready to receive the goods on board his ship. Whatever he may have said before, Mr. Xenos having intimated his readiness to receive the goods on the 1st of August, he was guilty of no breach of the contract on his part, and the Company were bound to perform it on theirs. The cases of *Goodman v. Pocock* and *Elderton v. Emmens* have no application here. It being the duty of an employer to continue the services of his clerk or other employee until duly terminated, the unlawful dismissal constitutes a complete breach, and a complete cause of action. So, in *Cort v. The Ambergate, &c., Railway Company*, it could not be necessary for the plaintiff to *171] manufacture the residue of the chairs after *the Company had given him notice that they would not accept or pay for them. The action was brought after the time for the delivery had elapsed. [BYLES, J.—Here, the action was not commenced until after the 1st of August.] In *Hochster v. De la Tour*, 2 Ellis & B. 689 (E. C. L. R. vol. 75), *Campbell, C. J.*, in delivering the judgment of the Court, says: "The declaration in the present case, in alleging a breach, states a great deal more than a passing intention on the part of the defendant which he may repent of, and could only be proved by evidence that he had utterly renounced the contract, or done some act which rendered it impossible for him to perform it." Nothing of the sort has occurred here. The same learned judge says in *Avery v. Bowden*, 5 Ellis & B. 728 (E. C. L. R. vol. 85),—"The language used by the defendant's agent before the declaration of war can hardly be con-

(a) The points marked for argument on the part of the defendant (Xenos) were as follows:—

"1. That, having been ready to perform his contract at the time fixed for its performance, he is not liable to be sued by the Company for a breach of it:

"2. That, upon the correspondence and facts, there was no breach by him of his contract with the Company:

"3. That the Company were not ready and willing to ship the goods at the time fixed for shipment, and are consequently not entitled to recover:

"4. That the letter of the 21st July, 1860, at the utmost only authorised the Company to elect to treat the contract as rescinded, and sue on a quantum meruit for anything due under it; but that, having elected to treat the contract as subsisting and binding, they cannot sue Mr. Xenos, who was willing to perform it:

"5. That Mr. Xenos, having been ready to receive the goods at the stipulated time, is entitled to recover damages for the non-shipment."

sidered as amounting to a renunciation of the contract: but, if it had been much stronger, we conceive that it could not be considered as constituting a cause of action after the captain still continued to insist upon having a cargo in fulfilment of the charter-party." Again, in *Reid v. Hoskins*, 5 Ellis & B. 729, 744, Lord Campbell says: "There is great difficulty in saying that at any time there ever was any renunciation of the contract which, had the plaintiffs been present, would have authorized them to consider it at an end, and to bring this action for refusing to load the ship before the expiration of the time within which the defendant undertook to load her. But, at all events, if they had such option, they were bound to exercise it: and they could not both hold the defendant to the prospective performance of the contract, and at the same time say that it was renounced." That is precisely what the plaintiffs were seeking to do here. [WILLIAMS, J.—In the notes to *Cutter v. Powell*, in 2 Smith's Leading Cases 1, where these cases are considered, reference is *made to the judgment of Parke, B., in *Phillpotts v. Evans*, 5 M. & W. 475, [*172 477;† and the learned editors say: "Perhaps the cases are reconcilable, by supposing that the judgment in *Hochster v. De la Tour* applies to cases in which, in consequence of the refusal, something has taken place to interfere with the performing the contract when the time arrives."] The rule is clearly stated by Parke, B., in *Phillpotts v. Evans*. That was an action for not accepting wheat contracted to be sold to the defendant and delivered at a future time. The question was as to the proper mode of estimating the damages. His lordship says: "If Mr. Richards could have established that the plaintiffs, after the notice given to them, could have maintained the action without waiting for the time when the wheat was to be delivered, then perhaps the proper measure of damages would be according to the price at the time of the notice. But I think no action would then have lain for the breach of the contract, but that the plaintiffs were bound to wait until the time arrived for delivery of the wheat, to see whether the defendant would then receive it. The defendant might then have chosen to take it, and would have been guilty of no breach of contract; for, all that he stipulates for is, that he will be ready and willing to receive the goods, and pay for them, at the time when by the contract he ought to do so. His contract was not broken by his previous declaration that he would not accept them; it was a mere nullity, and it was perfectly in his power to accept them nevertheless; and, vice versâ, the plaintiffs could not sue him before. The same rule was adopted in *Startup v. Cortazzi*, 2 C. M. & R. 165.† The notice amounts to nothing until the time when the buyer ought to receive the goods, unless the seller acts on it in the mean time, and rescinds the contract." Suppose the acceptor of a bill, before it *arrives at maturity, says to the holder, "I shall not pay the bill when presented," could it be contended for a moment that [*173 that gave the holder a present right to sue upon a quantum meruit? In *Barrick v. Buba*, 2 C. B. N. S. 563, 579 (E. C. L. R. vol. 89), Cockburn, C. J., in the course of the argument, says: "Avery v. Bowden is a distinct authority to show that the charterer's saying 'I cannot perform the contract,' does not amount to a breach until the expiration of the time stipulated by the contract for its performance.

It is no renunciation: he does not affect to say that he thereby gets rid of his obligation." [BYLES, J.—That is hardly a correct representation of *Avery v. Bowden*: it cannot be what the Lord Chief Justice said.] In *King v. Gillett*, 7 M. & W. 55,† to a declaration in assumpsit founded on mutual promises to marry within a reasonable time, it is a good plea, that, after the promise, and before any breach thereof, the plaintiff absolved, exonerated, and discharged the defendant from his promise and the performance thereof. Alderson, B., delivering the judgment of the Court, there says: "There are precedents in several of the books of entries,^(a) and there are two decided authorities, *Holland and Conier's Case*, 2 Leon. 214, and *Langden v. Stokes*, Cro. Car. 383. And we think this latter case explains the matter, and reconciles the present plea with general principles. It seems to have been treated there as a mere question of the form of plea; and so we think it is: for, although we are of opinion that this plea is good in point of form; yet we think the defendant will not be able to succeed upon it at *Nisi Prius*, in case issue be taken upon it, unless he proves a proposition to exonerate on the part of the plaintiff, acceded to by himself; and this in effect will be a rescinding of the contract previously made." [WILLIAMS, J.—Suppose *De la Tour* *174] had brought an action against *Hochster* for not entering into his service as courier, would the action have been maintainable?] Not if *Hochster* had at once assented to and acted upon *De la Tour's* renunciation of the contract. The plea alleging that the plaintiff exonerated and discharged the defendants from the performance of their contract, affords no answer to the breach, inasmuch as there could be no discharge except by the mutual consent of the contracting parties.

Mellor, Q. C., was not called upon to reply.

ERLE, C. J.—In the case of *The Danube and Black Sea Railway and Kustendjie Harbour Company v. Xenos*, I am of opinion that our judgment should be for the plaintiffs. The action is for not receiving on board the defendant's ship *Mavrocordatos* certain rolling stock, plant, and materials from the plaintiffs for conveyance to *Kustendjie*, pursuant to contract: and the question is whether or not the defendant has been guilty of a breach of that contract. It is to be taken that the contract was made between *Mr. Fitze* and *Mr. Parkes* as agents for the respective parties, and that it was a contract binding the defendant to receive the goods on board on the 1st of August, 1860. Has that contract been broken? Before the arrival of the 1st of August, viz., on the 21st of July, the defendant, *Xenos*, sent to the plaintiffs a letter in which he denied the existence of the contract, and gave them notice that he did not hold himself responsible for it. That alone would not constitute a breach of the contract: but, on a subsequent day, viz., the 23d of July, the plaintiffs' attorneys gave him a formal notice that they considered the contract binding, and were ready on their part to perform it, and that, if he persisted in his *175] refusal to perform it on his part, they would hold him responsible for all loss, damages, and expenses that might ensue. The defendant, in his answer to that communication, again denied the existence of the contract referred to, and tendered another contract for:

(a) *Rast. Entr.* 685; *Brown's Entr.* 67 (fol. edit.); *Hern's Pleader* 31.

the acceptance of the Company. On the 24th of July, the plaintiffs' attorneys again wrote to the defendant informing him that the plaintiffs declined to sign any other agreement than that already concluded between them and his agent Fitze, and repeating the intimation, that, as he still persisted in disavowing the contract, the plaintiffs would forthwith proceed to make other arrangements, holding him responsible for the consequences. All this happened before or on the 24th of July. Between that day and the 1st of August, the plaintiffs entered into a contract with Messrs. Smith & Co. to take out their rolling stock, plant, and materials to Kustendjie. On the 1st of August, the defendant gave notice to the plaintiffs that he was then ready to receive their goods on board the *Mavrocordatos*. The question is, had the original contract been broken by the defendant. I am of opinion that the law has been well laid down in the cases referred to on the part of the plaintiffs, that, where a contract is for the performance of a thing on a given day, it is competent to the party who is to perform it to declare before the day that he will not perform it, and then the other party has the option of treating that as a breach of the contract. In *Cort v. The Ambergate Railway Company*, 17 Q. B. 127 (E. C. L. R. vol. 79), it was held, that, upon the Company giving notice to Mr. Cort that they would not receive any more of his chairs, he might abstain from manufacturing them, and sue the Company for the breach of contract without tendering the goods for their acceptance. So, in *Hochster v. De la Tour*, 2 Ellis & B. 678 (E. C. L. R. vol. 75), it was held that the courier whose services were engaged for a period to commence *from a future day, being told before that day that they would not be accepted, was at [*176 liberty to treat that as a complete breach, and to hire himself to another party. And the boundary is equally well ascertained on the other side. Thus, in *Avery v. Bowden*, 5 Ellis & B. 714 (E. C. L. R. vol. 85), 6 Ellis & B. 953 (E. C. L. R. vol. 88), where the agent of the charterer intimated to the captain, that, in consequence of the breaking out of the war, he would be unable to furnish him with a cargo, and wished the captain to sail away, and the latter did not do so, it was held not to fall within the principle already adverted to, and not to amount to a breach or renunciation of the contract. But, where there is an explicit declaration by the one party of his intention not to perform the contract on his part, which is accepted by the other as a breach of the contract, that beyond all doubt affords a cause of action. I therefore think the Company under the circumstances had a right to sue Mr. Xenos for his breach of contract. As to whether it was competent to the defendant before the day for the performance of the contract to retract his declaration of breach,—which I incline to think it was not,—I am of opinion that the facts do not raise it. The defendant disclaimed being bound by the contract made on his behalf by Fitze, and tendered another and a different contract: and then, on the 1st of August, he professed his willingness to receive the goods on board his vessel. But, under which contract? If the Company had then sent the goods, it might have been evidence against them of an acceptance of the substituted contract proposed by Xenos, which materially differed from that which they had made with his clerk Fitze. I think the contract was broken by Xenos when he

declared that he would not hold himself bound by it, and that his renunciation of the contract was adopted, and, if that were necessary, *177] abundantly acted on by *the Company when they entered into a treaty with Messrs. Smith & Co. for the forwarding of their goods by another vessel. A great deal has been said about the inconvenience of the rule we are now acting on: but it seems to me that there would be intense inconvenience in holding that the parties to a contract of this nature may be left in doubt down to the very last moment as to whether it is to be performed or not. In this case, which is that of a railway company, to whom it must be of the utmost importance that a contract for the conveyance of their rolling stock should be duly performed, how unreasonable it would be to hold, that, having received an intimation from the defendant that he repudiates the contract made by his clerk, they must still wait until the day named for its performance is past before they can make arrangements for forwarding their goods by another ship. Mercantile convenience is entirely on the side of the rule which has been adopted by the Courts in the cases referred to. That disposes of the first case, and also of the substance of the claim urged by Xenos in his action against the Company for not sending the goods. Having broken the contract on his part by refusing to accept the goods under it, he can of course have no claim upon them for not sending them. A difficulty has been suggested as to the form of the plea: but, the Company having a substantial defence, if need were we would make the form yield to the substance. That which Xenos in terms complains of, is, that the Company did not forward their goods for shipment on board his vessel by the 1st of August. The Company in answer to that complaint say, that, before any breach of the contract by them, viz., on the 21st of July, the plaintiff discharged them from the performance of it. It is said there can be no discharge without the mutual consent *178] of the two contracting parties. In *one sense, there was a discharge by mutual consent: for, if one of the contracting parties says to the other, "I do not hold myself bound by the supposed contract, and will not perform it," and the other party intimates that he will act upon that refusal,—what is that, in substance, but a discharge from the performance of the contract by mutual consent? For these reasons, I am of opinion that the Company are entitled to our judgment in both actions.

WILLIAMS, J.—I am entirely of the same opinion. With respect to the first action, I think that the cases cited on the part of the plaintiffs have fully established, that, if before the time for the performance of a contract arrives, one of the parties thereto not merely asserts that he cannot or will not perform it, but expressly repudiates and renounces it, the party to whom the promise is made may treat that as a breach of the contract, at his option; at all events, where he has in consequence thereof acted so as to interfere with the performance of the contract on his part according to its original terms. The question is whether the present case is within the rule of law so established. I am of opinion that it is. What was said by Xenos in his letter of the 21st of July, was an express renunciation of the contract, upon which the Company were entitled to act as they did. In consequence of that letter, it became necessary for the Company to enter into a negotiation

with somebody else to carry for them to Kustendjie the goods which Xenos through his agent had contracted to carry for them. They did so. The rule above mentioned has been qualified to this extent, that the party, having the option of treating the renunciation as a breach of the contract, is bound to exercise his option, if he means to rely on the breach. Here the Company did exercise their option: *and, [179 although they did not before the 1st of August enter into a binding contract with Smith & Co., I think they did quite enough to satisfy this qualification of the rule.

Then, as to the cross-action brought by Xenos against the Company. If what was done here amounted to a rescinding of the contract, certainly that would be inconsistent with the Company suing for a breach of it. But the true effect of Xenos's conduct was, to discharge the Company from the performance of the contract on their part. I have certainly felt some difficulty in dealing with the plea: but I think it is a necessary consequence of the decision in *Hochster v. De la Tour*, and that class of cases, that, where there is by the party making the promise a renunciation which amounts to a breach, it must operate as a discharge of the other party from the performance of the contract on his part. I therefore think it is a good plea in such a case as this to say, that before breach the plaintiff discharged and exonerated the defendant from the performance of the agreement: and I think that the evidence of the renunciation which took place here may well support such a plea.

BYLES, J.—I also am of opinion that the Company are entitled to judgment in both actions. I give no opinion upon the form of the pleadings. The facts are referred to us; and if upon those facts we see that the Company are entitled to succeed, we may and indeed are bound to reform the pleadings so as to do justice between the parties. The declaration in the first action charges a refusal on the part of the defendant to perform the contract before the time for its performance had arrived: but the facts set out in the case are strong to show a refusal at the time fixed for *the performance; because, taking [180 Xenos's letter of the 1st of August in conjunction with his letters of the 23d of July, I can only construe it to mean "I am ready to receive your goods per *Mavrocordatos* upon the terms mentioned in my letter,"—not upon the terms of the original contract made with Fitze. If that be the true construction, all difficulty would be got rid of by an amendment of the first breach. Assuming, however, that the first letter amounts to no more than an intimation on the part of Xenos that he does not mean to perform the contract,—or, as my Brother Williams puts it, a renunciation of the contract before the day fixed for its performance had arrived,—there may be a difficulty, as would appear from the notes by the learned editors of *Smith's Leading Cases* to *Cutter v. Powell*, Vol. 2, p. 37, 5th edit., in reconciling the doctrine in *Phillpotts v. Evans*, 5 M. & W. 475,† and *Leigh v. Paterson*, 2 J. B. Moore 588, with the judgment of Lord Campbell in *Avery v. Bowden*, 5 Ellis & B. 714 (E. C. L. R. vol. 85). But it is unnecessary to go into that upon the present occasion, because here are at least two statements in writing by the Company before the 1st of August, that they will treat Xenos's renunciation as a breach of the contract, and hold him responsible for the consequences. Now, it is plain,

that, if, in consequence of that renunciation of the contract by Xenos, the Company were induced to incur liability and expense, and, still more, to make another contract for the transport of their goods by another vessel, the defendant must be held bound by it. There is strong evidence on the face of the case to show that another contract was entered into by the Company before the 1st of August. But, without going so far, the negotiations with Messrs. Smith & Co. for that purpose abundantly satisfy all that the law requires, if indeed *181] the law does require that there shall be some act done by *the other party to intimate his assent to the renunciation of the contract, beyond his saying so. For these reasons, it seems to me that the Company are entitled to succeed in both actions.

KEATING, J.—I entirely agree with the rest of the Court. It is unnecessary for us upon this occasion in any way to interfere with the cases of *Phillpotts v. Evans* and *Ripley v. McClure*, 4 Exch. 345,† because here was the strongest possible evidence of an entire repudiation of the contract on the part of Xenos. Indeed, so far does he carry his refusal to perform the contract entered into by his agent, that he on the 3d of August intimates that unless his demand,—a demand which he had no right to make,—is at once complied with, he will despatch his ship to another destination. But, what distinguishes this case from *Phillpotts v. Evans*, is, that here there is the strongest evidence of the Company having acted upon the refusal of Xenos to perform his contract. They begin by countermanding the orders they had given to the several railway companies to forward the goods to the Victoria Docks for shipment on board the *Mavrocordatos*: and, further, they enter into negotiations with Messrs. Smith & Co. for sending the goods by another vessel, which negotiations, if not amounting to actual binding contracts by the 1st of August, were in such a state of forwardness that they could not withdraw from them without placing themselves in a situation which they had no right to be placed in. I therefore agree with my Lord and my learned Brothers in thinking that the Company are entitled to judgment in both actions.

Judgment for the plaintiffs in the first action.

Judgment for the defendants in the second action.

Crist v. Armour, 34 Barb. (N. Y.) 378.

*182]

*WALLINGER v. GURNEY. Nov. 13.

An *interim* order of protection under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, protects the insolvent from arrest on a ca. sa. upon a judgment against him for a debt contracted since the filing of his petition, although the *final* order does not.

Quære, as to what is put in issue under "not guilty" in an action against the sheriff for the wrongful discharge of a defendant arrested on a ca. sa.?

THIS was an action against the sheriff of Surrey for an alleged wrongful discharge from custody of one George Bygrave Knights, and for a false return of non est inventus. Plea, not guilty.

The cause was tried before Erle, C. J., at the sittings in Middlesex after last Easter Term, when the following facts appeared in evidence:—In February, 1861, the plaintiff recovered a judgment against Knights in an action for money lent, upon which judgment a *ca. sa.* was issued and delivered to the defendant as sheriff to be executed, and Knights was arrested under it on the 21st of February: but, upon the production of an interim order of protection from the Court of Bankruptcy, the officer discharged him; and, the sheriff being afterwards ruled to return the writ, returned *non est inventus*.

It appeared that the debtor Knights had filed his petition in the Court of Bankruptcy under the 5 & 6 Vict. c. 116 and 7 & 8 Vict. c. 96, and on the 11th of July, 1860, received an interim order of protection which contained the following words,—“A protection is hereby given to the said George Bygrave Knights from all process whatever (except as hereinafter mentioned) either against his person or his property of every description, which protection shall continue in force, and all process (except process for arresting or holding him to trial under the authority of a Judge's order for that purpose) is stayed until the 5th of November next, at eleven in the forenoon, being the time appointed for his first examination.” The protection granted by this order was from time to time renewed until the 10th of May, 1861, the insolvent's *examination having been delayed in consequence [*183 of his serious illness.

On the part of the plaintiff, it was insisted that the order of protection was no answer to the action, inasmuch as it could only operate to protect the insolvent against process in respect of debts due at the time of filing his petition; and that, at all events, the defence was not available under the plea of not guilty.

Under the direction of the learned Judge, the jury (who, upon the question being put to them, found that the plaintiff had sustained no loss through Knights's discharge) returned a verdict for the defendant,—leave being reserved to the plaintiff to move to enter a verdict for him with 1*s.* damages, if the Court should be of opinion that either of his objections was well founded,—and power being also reserved to the Court to amend if they should think fit.

Archibald, accordingly, in Trinity Term, obtained a rule nisi to enter a verdict for the plaintiff with 1*s.* damages, on the grounds,—first, that the protection order was not available against the plaintiff's judgment,—secondly, that the evidence of the protection order was not admissible under not guilty. He referred to *Rideal v. Fort*, 11 Exch. 847,† *Hodges v. Paterson*, 26 Law J., Exch. 228, *Beavan v. Walker*, 12 C. B. 480 (E. C. L. R. vol. 74), and *Wright v. Lainson*, 2 M. & W. 739.†

J. Powell and *Howard*, on a former day in this term, showed cause.—The main question is whether the interim order of protection granted to Knights by the Court of Bankruptcy was a sufficient justification to the sheriff for discharging him from custody. It is submitted that it was. It will be contended on the other side that the order could have no application to the plaintiff's debt, because it was not in the schedule, and *in fact had not been contracted at the time of [*184 filing the insolvent's petition. The true question, however, is, whether the order is, as its words import, an absolute protection from

all process. The order is granted under the 5 & 6 Vict. c. 116, s. 1, which, after providing that any person not being a trader, or, being a trader, owing less than 300*l.*, on giving and publishing the required notice, may present a petition to the Court of Bankruptcy, stating the debts owing by and to him, proceeds to enact that "it shall thereupon be lawful for the Judge or Commissioner of the Court of Bankruptcy to whom by any order of the Court as hereinafter provided the same shall be referred, or for the Commissioner in the country to whom the petition shall be presented, to give, upon the filing of such petition, a protection to the petitioner *from all process whatever* either against his person or his property of every description, which protection shall continue in force, *and all process be stayed*, until the appearance of the petitioner in Court as hereinafter provided." And by the 6th section of the 7 & 8 Vict. c. 96, it is declared and enacted "that any prisoner in execution upon any judgment obtained in any action for the recovery of any debt, either not being a trader within the meaning of the statutes relating to bankrupts, or, being a trader within the meaning of the said statutes, owing debts amounting in the whole to less than 300*l.*, may be a petitioner for protection from process; and every such petitioner to whom an interim order for protection shall have been given shall not only be protected from process as provided by the recited act (5 & 6 Vict. c. 116), but also from being detained in prison in execution upon any judgment obtained in any action for the recovery of any debt mentioned in his schedule; and if any such petitioner, being a prisoner in execution, shall be detained in prison in execution *185] upon any such judgment, it shall be lawful for the Commissioner to order any officer who shall have such petitioner in custody by virtue of such execution to discharge such petitioner out of custody as to such execution, without exacting any fee, and such officer shall hereby be indemnified for so doing; and no sheriff, gaoler, or other person whatsoever shall be liable to any action as for the escape of any such prisoner by reason of such his discharge; and such petitioner so discharged shall be protected by his interim order from *all process* for such time as the Commissioner shall by such interim order or any renewal thereof think fit to appoint, until the making of the final order for protection, in the same manner as if such petitioner had not been a prisoner in execution," &c. *Thomas v. Hudson*, 14 M. & W. 353,† which was decided upon this statute, was a much stronger case than this. There, the plaintiff, having obtained judgment against one F. in an action of *assault and false imprisonment*, sued out a *ca. sa.*, whereon F. was taken and committed to the Queen's Prison, of which the defendant was the keeper. F. afterwards petitioned the Court of Bankruptcy for his discharge under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, and, having obtained from the Commissioner an order for his discharge, was, in obedience thereto, discharged by the defendant accordingly. The plaintiff having brought an action against the defendant for an escape, it was held by the Court of Exchequer (whose judgment was affirmed on error, 16 M. & W. 885†), that, whether this was or was not a debt from which the Commissioner had power to discharge the prisoner, the defendant was protected, being bound to obey the order of the Commissioner, who was acting judi-

cially in a matter over which he had jurisdiction. [The Court called upon

**Archibald* to support his rule.—The petition has reference only to the debts mentioned in the insolvent's schedule: the [*186 protection, consequently, must also be limited to those debts: the Commissioner has no jurisdiction to grant a protection against process for debts subsequently contracted. The words "all process" must have a reasonable construction; and can only apply to process against which the petitioner asks for protection. [ERLE, C. J.—The legislature may very well have intended to give the interim order a more extensive operation than the final order, for the purpose of leaving the petitioner free to assist in the realization of his assets. By the 1st section of the 5 & 6 Vict. c. 116, the interim order is to be a protection from *all process* whatever. The final order under s. 4 is a protection only against the debts mentioned in the schedule.] In *Beavan v. Walker*, 12 C. B. 480 (E. C. L. R. vol. 74), where it was held that a final order under these statutes is no protection against an execution on a judgment in an action for tort signed after, upon a verdict obtained before, the making of such final order. Jervis, C. J., there says: "The question turns upon the construction of two statutes,—the 5 & 6 Vict. c. 116, and the 7 & 8 Vict. c. 96. With regard to the former of these statutes, the words seem to me to show plainly that it was intended to apply to *debts*, and to debts only. Indeed, the only argument urged by Mr. *Hawkins* upon that statute is founded upon the 4th section, which says that 'the order shall be called a final order, and shall be for the protection of the person of the petitioner from *all process*, and for the vesting of his estate and effects in the official assignee. It is manifest that that section was not meant to have so extensive a meaning as that suggested; but that it was intended that the final order should protect the party from all process which shall have reference to the *subject-matters which could under the [*187 statute come before the Commissioner for adjudication. The 7 & 8 Vict. c. 96, so far as regards the jurisdiction, seems to me to come to the same result." The only debts which can be inquired into are those inserted in the schedule: and to these only would the final order be a bar under s. 10. [KEATING, J.—Could the Commissioner amend the schedule by inserting this debt?] He could not. The 22d section of the 7 & 8 Vict. c. 96 enacts "that the final order to be made under the provisions of the said Act (5 & 6 Vict. 116) as amended by this Act, shall protect the person of the petitioner from being taken or detained under any process whatever in the cases hereinafter mentioned, that is to say, from all process in respect of the several debts and sums of money due or claimed to be due *at the time of filing the petition* from such petitioner to the several persons named in his schedule as creditors, or as claiming to be creditors for the same respectively, or for which such persons shall have given credit to such petitioner *before the time of filing such petition*, and which were not then payable, or in respect of the claims of any other persons not known to such petitioner at the time of making the final order, who may be endorsees or holders of any negotiable securities set forth in such schedule." The whole of the legislation has reference to debts contracted before the time of filing the petition, and to debts men-

tioned in the schedule. [WILLIAMS, J.—The section just referred to applies to the final order.] It may be that the execution-debtor might have been entitled to be discharged on application to a Judge,—see *Rideal v. Fort*, 11 Exch. 847,†—but still it was the duty of the sheriff to execute the writ: it was not for him to determine the nature and extent of the protection afforded by the order. If it had been the *188] intention of *the legislature to give the insolvent a more extensive protection under the interim order than that given by the final order, one would have expected to find the language of the two sections different. The meaning of the two statutes is only to be judged of by the whole scope and object of them. [BYLES, J.—Why is it that no mention is made of the interim order in the 7 & 8 Vict. c. 96?] That statute contemplates only persons in actual custody. [BYLES, J.—Cresswell, J., in giving judgment in *Phillips v. Pickford*, 9 C. B. 459, 476 (E. C. L. R. vol. 67), 1 L. N. P. 136, points out the inconsistency of the 4th section of the 5 & 6 Vict. c. 116 with the 22d section of the 7 & 8 Vict. c. 96.] Then, the plea of not guilty puts in issue only the act alleged to have been wrongfully done, and not the wrongfulness of the act. [WILLIAMS, J.—The sheriff did not wrongfully discharge Knights, if the facts constituted a defence.] All the authorities, from *Francum v. The Earl of Falmouth*, 2 Ad. & E. 452 (E. C. L. R. vol. 29), 4 N. & M. 330 (E. C. L. R. vol. 30), down to *Renshaw v. Bean*, 18 Q. B. 112 (E. C. L. R. vol. 83), show that the wrongfulness is not put in issue by not guilty. [BYLES, J.—I should ask you what the plea ought to be, and amend the record accordingly. It is quite unnecessary to discuss this point.] *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the Court: (a)—

This was an action against the sheriff for the wrongful discharge of a prisoner. It appeared that the sheriff had discharged the former defendant on the production of an interim protection order given under the 5 & 6 Vict. c. 116, s. 1; and it also appeared that the debt *189] for which the plaintiff had recovered judgment did *not exist till after the petition of that defendant had been filed: and, under these circumstances, the question has been, whether the production of such an order to the sheriff made the discharge lawful.

The statute enacts, that, after filing the petition, “it shall be lawful for the Court to give a protection to the petitioner against all process whatsoever either against his person or his property of every description; which protection shall continue in force and all process be stayed” until the party appears for examination,—his estate being thereupon vested in the assignee.

The words “a protection against all process whatsoever against his person” clearly comprise a protection against the *capias* here in question: and there may be reasons for giving an interim entire protection, to enable the debtor to assist in collecting his assets. The clause directing the protection to continue in force, and the process to be stayed until the appearance, also expresses clearly an absolute protection, and directs that the process shall be stayed, that is, shall not be executed. The words of the order produced in evidence expressed an absolute protection in the words of the statute: and it would be

(a) The case was argued before Erle, C. J., Williams, J., Byles, J., and Keating, J.

inconvenient to require the sheriff to understand that words expressing an absolute protection meant only a qualified protection.

The plaintiff contended that the interim order for protection ought to be confined to the debts specified in the schedule, upon the same ground as had led to a limited construction of the absolute words in the final order for protection given under s. 4 of the same statute: and he relied on *Beavan v. Walker*, 12 C. B. 480 (E. C. L. R. vol. 74), where the sheriff had arrested a defendant who had a final order for protection, in an action of tort, where the verdict was before the petition and the judgment after: and the Court held that the defendant was not entitled to be discharged, not only because it *was an action of tort, and the plaintiff who has got a verdict is not a creditor for the sum given by the verdict before judgment, but also because the final order only protected from all process which could have reference to the subject-matters which could come before the Commissioner for adjudication under s. 4; under which section protection is to be given after adjudication. The reason here lastly assigned for limiting the final order to the matters to be examined into has no application to the interim order, which is given absolutely without reference to any examination.

This distinction between the final order and interim order is confirmed by subsequent legislation. By the 7 & 8 Vict. c. 96, s. 22, it is enacted that the final order made under the 5 & 6 Vict. c. 116, amended by this Act, shall protect the person of the petitioner in effect from the debts in the schedule, according to the principle expressed in *Beavan v. Walker*. While the legislature thus qualified the absolute words of the final order, it not only left the absolute words of the interim order without qualification, but by s. 6 again enacted that the interim protection should be absolute, for, it extends the power of petitioning to prisoners in custody, and enacts that every such petitioner to whom an interim order for protection shall have been given shall not only be protected from process as provided by the recited Act, but also from being detained in prison on any judgment, &c.

It is further worthy of notice that the legislature at the same time, by 7 & 8 Vict. c. 70, s. 7, considers the effect of the interim protection; and, in respect of interim orders under that Act, gave the Commissioner power to give a temporary protection from arrest within limits and upon conditions. It seems clear, therefore, that the legislature intended to leave an absolute protection under the interim order now in question.

*This construction was judicially confirmed in *Thomas v. Hudson*, 14 M. & W. 353, 372,† where the Court say, "The policy of the legislature in the first statute appears to have been to relieve the petitioner in the first instance from all apprehension of arrest immediately on presenting his petition, and so giving up all his property, though, after examination, this protection might be taken away."

The case of *Rideal v. Fort*, 11 Exch. 847,† was cited to show that the sheriff was found to arrest and leave the party to apply to a Judge for his discharge. But the case does not decide that this was the duty of the sheriff. The action was trover against the sheriff for levying under a *fieri facias* goods of a petitioner which were excepted out of the

statutes; and it was held that the sheriff was not liable, but that the party might obtain his goods by applying to a Judge. The case has no application to the duty of a sheriff in respect of arrest.

For these reasons, we think that the interim order was a protection to the former defendant, and rendered the discharge by the present defendant lawful.

If there had been a doubt upon the construction of the statutes, the principle of the decision in *Thomas v. Hudson*, *suprà*, protecting the gaoler in obeying the plain words of the order for protection, would apply to a sheriff obeying the plain words of the order produced to him in this case.

We think the sheriff was not guilty of a wrongful discharge, and that the plea is sufficient. We did not hear Mr. *Archibald* further on this point, because, if he altered our opinion, the Court would have amended the record.

Rule discharged.

*192] *HOLLIDAY v. The Vestry of the Parish of ST. LEONARD, SHOREDITCH. May 22.

Persons intrusted with the performance of a public duty, discharging it gratuitously, and being personally guilty of no negligence or default, are not responsible for an injury sustained by an individual through the negligence of workmen employed under them.

The vestry of L., in whom were by the Metropolis Local Management Act (18 & 19 Vict. c. 720) vested the powers and duties of surveyors of highways, under the powers conferred upon them by that Act appointed a surveyor at a salary. Workmen employed by the surveyor, and paid out of the parish funds, being directed to carry certain paving-stones from a public street under repair, and place them in another public street, so negligently performed that duty that the plaintiff in driving through the last-mentioned street was upset and injured:—Held, that the vestry were not responsible.

THIS was an action for negligence. The declaration stated that the defendants, on the 12th of September, 1860, in a certain street called Shaftesbury Street, in the parish of St. Leonard, Shoreditch, in the county of Middlesex, laid, put, and placed a quantity of stones on and above the level of the surface of the said street, and wrongfully, carelessly, and negligently suffered and permitted the same to be left and remain in the said street on and above the level of the surface thereof, during the night, the same being a dark one, without a sufficient or any light or signal at or near to the said stones to cause the same to be seen by persons driving in and along the said street, and without having any watchman or person to take care of the same, and without having any board or protection, and without taking any reasonable or proper means or precautions to prevent the said last-mentioned persons from driving against or upon the said stones, and being injured thereby; and that, by means of the premises, the plaintiff, who was then riding and being driven in a cart in the said street, on the said night, was driven, and the said cart ran against and came into collision with and upon and against the said stones, and the plaintiff was cast and thrown from and out of the said cart down to and upon the ground, and was much hurt, bruised, wounded, and injured, and was put to great expense, to wit, &c., in and about endeavouring to get healed, &c.

Plea, not guilty by statute,—the statute referred to *in the margin being the General Highway Act, 5 & 6 W. 4, c. 50. [*193

The cause was tried before Erle, C. J., at the sittings in Middlesex after last Hilary Term, when the following facts appeared in evidence:—The defendants, the vestry of St. Leonard's, Shoreditch, in whom, by virtue of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, s. 96,(a) are vested the powers and duties of surveyors of highways, and who by s. 62 of the same Act are empowered to appoint such surveyors, officers, and servants as they may think fit, duly appointed one Freeman to be the surveyor of the highways for the parish, at a salary.

In the early part of September, 1860, the pavement *in a certain street in the parish called Cavendish Street being under repair, the labourers employed, by the direction of the surveyor or his deputy, removed a quantity of old paving-stones from Cavendish Street to Shaftesbury Street, and there left them without any light or signal to give notice of the obstruction, and in consequence the plaintiff whilst being driven along the road there in a gig was upset and severely injured. [*194

The surveyor, who was called, stated that he, as well as his deputy, were appointed by the vestry at a salary; that he employed the labourers, who were paid out of the parish funds; and that he directed the stones to be placed in Shaftesbury Street, but did not indicate the particular spot on which they were to be placed, and never saw them there.

On the part of the defendants it was submitted, that, being a public body acting gratuitously for the benefit of the public, and guilty of no negligence, they were not responsible for the negligence of their servants.

The learned Judge declined to nonsuit, but directed a verdict to be entered for the plaintiff,—reserving leave to the defendants to move to enter a verdict for them, or a nonsuit, if the Court should be of opinion that they were not under the circumstances liable.

Raymond, in Easter Term last, obtained a rule nisi accordingly, on the grounds,—“first, that there was no evidence to go to the jury as against the defendants,—secondly, that the evidence showed that the defendants were not liable.” He referred to *Whitfield v. Lord Le Despencer*, Cowp. 754, *Hall v. Smith*, 2 Bingh. 156 (E. C. L. R. vol. 9),

(a) Which enacts that “every vestry and district board shall, within their parish or district (exclusively of any other persons whatsoever), execute the office of and be surveyors of highways, and have all such powers, authorities, and duties, and be subject to all such liabilities as any surveyor of highways in England is now or may hereafter be invested with or liable to by virtue of his office, under the laws for the time being in force, so far as such powers, authorities, duties, and liabilities are not inconsistent with this Act; but all expenses which under any such law ought to be defrayed by highway-rates shall be defrayed by means of the rates to be raised under this Act, and all moneys which would be applicable in aid of such highway-rates shall be applied in aid of the said rates to be raised under this Act; and no such vestry or board shall be subject to any provisions concerning the accounts of surveyors of highways, or requiring any returns to be made to any special sessions; and all streets, being highways, and the pavements, stones, and other materials thereof, and all other things provided for the purposes thereof by any surveyor of highways, or by any person serving the office of surveyor of highways, or by any vestry or district board under this Act, shall vest in and be under the management and control of the vestry or district board of the parish in which such highways are situate.”

9 J. B. Moore 226 (E. C. L. R. vol. 17), *Duncan v. Findlater*, 6 Clark & Fin. 894, and *Manley v. The St. Helen's Canal Railway and Company*, 2 Hurlst. & N. 840.†

*195] *Shee, Serjt., Francis, and Galway*, in Trinity Term, showed cause.—The persons whose negligence caused the injury to the plaintiff having been employed by the salaried servant of the vestry to do the thing complained of, the case falls within the ordinary rule which makes an employer liable for the negligence of his servants and workmen. No ground can be suggested upon which a body like this can claim any immunity or exemption from liability. The case of *Ruck v. Williams*, 3 Hurlst. & N. 308,† very nearly approaches the present case. There the plaintiff was the owner of premises in Cheltenham which were drained by a sewer which emptied itself into the river Chelt. At the mouth of the sewer there was a flap or penstock which prevented any water of the river from flowing up the sewer. In the year 1852, an Act of parliament passed for improving the town of Cheltenham (15 Vict. c. 1), which directed the Commissioners appointed under it to make new sewers. Accordingly, the Commissioners constructed a new sewer which passed under the river Chelt near the plaintiff's premises, and removed the flap from the mouth of the old sewer and connected it with the new sewer. The plaintiff's premises were twelve feet below the summit-level of the new sewer. In July, 1855, there was a heavy storm of rain, by which the river Chelt was flooded, and in consequence the new sewer burst and the water of the river flowed into it. The Commissioners erected a stank round the hole, but, before the repair of the sewer was completed, another extraordinary flood took place, by which the stank was washed away, and the water of the river rushed into the sewer and forced the sewage matter and water into the plaintiff's premises, thereby causing great damage. The 15 Vict. c. 1, incorporates the 144th section of the *196] Public Health Act, 1844, which provides, "that full *compensation shall be made out of the general or special district-rates to be levied under this Act, to all persons sustaining any damage by reason of the exercise of any of the powers of this Act. And it was held,—first, that the Commissioners were liable to an action for negligence, and were entitled to reimburse themselves out of the rates,—and, secondly, that they were guilty of negligence in not putting up a flap or penstock at the mouth of the old sewer. There are no express words in the Metropolis Local Management Act directing out of what fund damages shall be paid; but the 224th section seems to imply that the vestry or district board are to be liable to damages.(a) In *Duncan v. Findlater*, 6 Clark & Fin. 894,—which will be relied on for

(a) "In every case where the amount of any damage, costs, or expenses is by this Act directed to be ascertained or recovered in a summary manner, or the amount of any damage, costs, or expenses is by this Act directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount shall, in case of dispute, be ascertained and determined by, and shall be recovered before, two justices; and the amount of any compensation to be made under this Act by the said Metropolitan Board, or any vestry or district board, shall, unless herein otherwise provided, be settled, in case of dispute, by, and shall be recovered before, two justices, unless the amount of compensation claimed exceed 50*l.*, in which case the amount thereof shall be settled by arbitration, according to the provisions contained in the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), which are applicable where questions of disputed compensation are authorized or required to be settled by arbitration."

the defendants,—the persons employed were not in the situation of servants to the trustees. In *Kendall v. King*, 17 C. B. 483 (E. C. L. R. vol. 84), by the 17th section of the 8 & 9 Vict. c. 126, a select number of the justices for the county or borough, called the "committee of visitors," were empowered to contract for plans, &c., for the erection of a lunatic asylum for the county, &c.; *and by s. 16 [*197 they were enabled to sue and be sued in the name of their clerk: and it was held that an action might be maintained against the committee of visitors in the name of their clerk, in respect of a contract so entered into by them,—although the plaintiff might have no means of enforcing his judgment when obtained. Cresswell, J., there says: "I am free to confess that the case is not without difficulties. *Wormwell v. Hailstone*, 6 Bingh. 668 (E. C. L. R. vol. 19), 4 M. & P. 512, is an instance of an action being held to be maintainable against a clerk to trustees; for, though the execution against the nominal defendant was set aside, the action was maintained. In *Andrews v. Dally*, 4 Bingh. 566 (E. C. L. R. vol. 13), 1 M. & P. 490 (E. C. L. R. vol. 17), it was held that an action could not be maintained, not because no action would lie, but because a specific fund was provided to meet the claim. It is no answer, therefore, to say that the action will not lie, because the plaintiff cannot have execution. In general, if a man enters into a contract, and fails to fulfil it, he is liable to be sued." [ERLE, C. J.—There, the parties had made a contract in the regular course of the business for which they were constituted, and it became their duty to raise funds to enable them to perform it. That is very different from the case of an action for unliquidated damages for the negligence of a labourer or servant.] In *The Southampton and Itchin Floating Bridge Company v. The Southampton Local Board of Health*, 28 Law J., Q. B. 41, it was held that an action will lie against a local board of health of a corporate district, under the 11 & 12 Vict. c. 63, as a body, for negligently carrying out works within their powers so as to cause injury to an individual, *e. g.*, for so negligently and improperly constructing a sewer as to cause a nuisance by its discharge. "The local board of health," says Lord Campbell, C. J., "is a representative body, constituted by the rate-payers; and *there is no great injustice in saying that the rate-payers must [*198 ultimately be liable for the misconduct of the board which represents them. There would be less injustice in this than in saying that an individual injured has no substantial remedy." [ERLE, C. J.—That was a case in which the board had been guilty of negligence in the performance of a duty cast upon them by the law. The board by a resolution directed that the sewage should be poured out at an improper place: the nuisance was their act.] So, here, the vestry, by their servants, have been guilty of negligence in the performance of a duty cast upon them by the law. [BYLES, J.—Is a surveyor of highways, who has exercised due care in the selection of his subordinates, responsible for the acts of his labourers?] In *Scott v. The Mayor, &c., of Manchester*, 2 Hurlst. & N. 204,† the defendants, a municipal corporation, were empowered by Act of Parliament to construct gas-works and to supply gas and sell and dispose of the coke; the surplus profits to go in reduction of the water-rates and otherwise towards the improvement of the town. In an action against the defendants, the

declaration alleged that they employed workmen to lay down the pipes, who so negligently conducted themselves that a piece of metal was projected against the plaintiff. The defendants pleaded, that the grievances were bonâ fide done by the defendants in the course of executing the powers conferred on them by their Act, and without any neglect, misconduct, &c., of the defendants, otherwise than by their workmen or one of them, and that the workmen were well skilled and qualified and proper persons to be employed by them: and it was held by the Exchequer Chamber,—affirming the judgment of the Court of Exchequer,—that the plea was no answer to the action.

*199] [BYLES, J.—There the corporation had the benefit of *the work done.] In *Jones v. Bird*, 5 B. & Ald. 837 (E. C. L. R. vol. 7), where it was held that commissioners of sewers were responsible for damage resulting from the negligent performance of works done by them, Bayley, J., says: "It is contended that the defendants are protected if they acted bonâ fide and to the best of their skill and judgment. But that is not enough: they are bound to conduct themselves in a skilful manner." So, in *Gibbs v. The Trustees of the Liverpool Docks*, 3 Hurlst. & N. 164,† the defendants were held liable for the consequences of their negligence in suffering the entrance to the docks to continue in a dangerous state. [WILLES, J.—The Commissioners there invited people to come to their docks, and therefore were bound to take care that they were in a fit state. They could have no knowledge of that but by their officers or servants. I do not see how the case at all applies here.] By the 96th section it is provided that the vestry or district board shall be subject to the same liabilities as the surveyor of highways. Now, a surveyor of highways is liable for malfeasance: *Alston v. Scales*, 9 Bingh. 3 (E. C. L. R. vol. 23), 2 M. & Scott 5 (E. C. L. R. vol. 28): and see 5 & 6 W. 4, c. 50, s. 56, which imposes a penalty on a surveyor allowing stones, &c., to remain on a highway unguarded at night. [WILLES, J.—In *Alston v. Scales*, the thing complained of was the act of the surveyor himself: here, you are seeking to make the defendants responsible for the acts of others.] *Davis v. Curling*, 8 Q. B. 286 (E. C. L. R. vol. 55), shows that the surveyor would be liable for such an act as is here charged. The principle of the employer's liability for the negligent acts of servants and others, is well expounded by Littledale, J., in *Laugher v. Pointer*, 5 B. & C. 547, 553 (E. C. L. R. vol. 11),—"For the acts of a man's own domestic servants there is no doubt but the law makes him responsible; and, if this accident had been occasioned by a coachman who constituted a part of the *defendant's own family, there would be no doubt of the defendant's liability: and the reason is, that he is hired by the master either personally or by those who are intrusted by the master with the hiring of servants, and he is therefore selected by the master to do the business required of him. This rule applies not only to domestic servants who may have the care of carriages, horses, and other things, in the employ of the family, but extends to other servants whom the master or owner selects and appoints to do any work or superintend any business, although such servants be not in the immediate employ or under the superintendence of the master. As, for instance, if a man is the owner of a ship, he himself appoints the master, and he desires the master to appoint and select the crew:

the crew thus become appointed by the owner, and are his servants for the management and government of the ship; and, if any damage happens through their default, it is the same as if it happened through the immediate default of the owner himself. So, the same principle prevails if the owner of a farm has it in his own hands, and he does not personally interfere in the management, but appoints a bailiff or hind who hires other persons under him, all of them being paid out of the funds of the owner, and selected by himself or by a person specially deputed by him—if any damage happen through their default the owner is answerable, because their neglect or default is his, as they are appointed by and through him. So, in the case of a mine, the owner employs a steward or manager to superintend the working of the mine, and to hire under-workmen, and he pays them on behalf of the owner. These under-workmen then become the immediate servants of the owner, and the owner is answerable for their default in doing any acts on account of their employer." *Hall v. Smith*, 2 Bingh. 156 (E. C. L. R. vol. 9), 9 *J. B. Moore 226 (E. C. L. R. vol. 17), turned entirely on the absence of funds to [201 meet the claim; and the clerk was sued there, not the Commissioners themselves. *Harris v. Baker*, 4 M. & Selw. 27, was a case of the same class. In *Sutton v. Clarke*, 6 Taunt. 34 (E. C. L. R. vol. 1), 1 Marsh. 429 (E. C. L. R. vol. 4), and *Boulton v. Crowther*, 2 B. & C. 703 (E. C. L. R. vol. 9), 4 D. & R. 195 (E. C. L. R. vol. 16), it was assumed that the trustees would have been liable if they had been guilty of negligence. In the last-mentioned case, Abbott, C. J., says: "If, in doing the act, they acted arbitrarily, *carelessly*, or oppressively, the law in my opinion has provided a remedy. But the fact of their having done so is negatived by the finding of the jury. Persons employed in the execution of works for the Commissioners of Sewers under the 11 & 12 Vict. c. 112, are, by express enactment (s. 128), exempted from personal liability; but the Commissioners, nevertheless, may be sued: *Ward v. Lee*, 7 Ellis & B. 426 (E. C. L. R. vol. 90). In *Whitehouse v. Fellowes*, 10 C. B. N. S. 765 (E. C. L. R. vol. 100), where trustees of a turnpike road had been guilty of negligence in constructing and maintaining works, they were held responsible in damages to the party injured. In *Meek v. The Whitechapel Board of Works*, 2 Fost. & F. 144, an action was held to be maintainable against a local board, under the Metropolis Local Management Act, for not keeping a sewer cleansed, whereby it became choked up, and the overflow therefrom ran into the plaintiff's premises." [WILLES, J.—That would be something like the case of *Gibbs v. The Liverpool Dock Company*.] The judgment of Maule, J., in *Overton v. Freeman*, 11 C. B. 867 (E. C. L. R. vol. 73), is strong to show that the defendants are liable for the negligence of the servants employed under them; as also in *Seymour v. Greenwood*, 6 Hurlst. & N. 359.†

Raymond and Watkin Williams, in support of the rule.—The rule is neatly stated in 1 Chitty Pl., 7th *edit. p. 87,—“Trustees [202 and commissioners acting gratuitously in the execution of Acts of parliament for the benefit of the public, and intrusted with the conduct of public works, are not liable in damages for an injury occasioned by the negligence or unskilfulness of workmen and contractors necessarily employed by them in the execution of the works:”

and the cases of *Hall v. Smith*, 2 Bingh. 156 (E. C. L. R. vol. 9), 9 J. B. Moore 226 (E. C. L. R. vol. 17), *Harris v. Baker*, 4 M. & Selw. 27, *Sutton v. Clark*, 6 Taunt. 34 (E. C. L. R. vol. 1), 1 Marsh. 429 (E. C. L. R. vol. 4), and *Boulton v. Crowther*, 2 B. & C. 703 (E. C. L. R. vol. 9), 4 D. & R. 195 (E. C. L. R. vol. 16), are referred to. The facts of this case bring it precisely within the principle of *Hall v. Smith*, which was distinctly recognised in *Humphreys v. Mears*, 1 Man. & R. 187 (E. C. L. R. vol. 17), and *Duncan v. Findlater*, 6 Clark & Fin. 894. These authorities, it is submitted, are abundantly sufficient to establish the principle laid down by Chitty. The subject was much discussed in *Lane v. Sir Robert Cotton*, 1 Ld. Raym. 646, Comb. 110, 11 Mod. 12, 12 Mod. 482, 1 Salk. 17, Holt 582, Carth. 487, where it was held that the postmaster-general was not responsible for the loss of a letter through the negligence of one of the servants of the post-office: and that case was followed by *Whitfield v. Lord Le Despencer*, Cowp. 754, where Lord Mansfield, who goes very fully into the subject, puts it on the ground that public officers are not liable for constructive negligence by the acts of their subordinates. The same principle was acted upon in *Nicholson v. Mouncey*, 15 East 384, where it was held that the captain of a sloop of war was not answerable for damage done by her running down another vessel; the mischief appearing to have been done during the watch of the lieutenant, who was upon the deck and had the actual direction and management of the steering and navigating of the sloop at the time, and when the captain was not upon deck, nor was called upon by his *203] duty to be there. [WILLES, J.—“The captain of a vessel of war does not employ the other officers or the seamen.”] The case is perhaps open to that answer. Here, Freeman, the surveyor, received no specific direction from the vestry to do as he did; nor did he direct the workmen to place the stones where they were placed. Upon what principle, then, can the defendants be liable? The 96th section of the Metropolis Local Management Act, it is true, imposes upon the vestry the duties of surveyors of highways: but the surveyor of the highways is only liable for his own acts. Not one of the cases relied upon for the plaintiff at all trenches on the principle on which the defendants rest their case.

ERLE, C. J.—I am of opinion that this rule should be made absolute. The action is brought to recover damages for an injury sustained by the plaintiff through his being upset whilst driving along a public highway in a gig, in consequence of certain paving-stones having been negligently and improperly left there. The question was whether the defendants are liable for the act of the workmen employed by their surveyor in so negligently placing an obstruction in the way. The defendants are the vestry of the parish of St. Leonard, Shoreditch,—a public body clothed with a public trust and liable for the performance of a public duty under the Metropolis Local Management Act, 18 & 19 Vict. c. 120. Under the powers conferred upon them by that Act, the vestry appointed one Freeman to be surveyor of highways for the parish, and he employed certain labourers or workmen to do certain work, and in the course of that employment the workmen did the wrongful act which occasioned the damage of which the plaintiff complains. If, instead of a public body,

this had been the case of a private individual employing workmen to pave a highway, *and an injury had resulted to a third person [*204 from the negligent conduct of the workmen in performing the work, it is agreed on all hands that the employer would have been liable. But the question is whether the defendants, being trustees for public purposes, gratuitously giving their services for the public good, can be made liable where they have personally been guilty of no default, and in fact were ignorant of the work being done, the employment of the workmen being the act of their surveyor. I am of opinion that they are not liable. The principle which has been contended for by Mr. *Raymond* and Mr. *Watkin Williams* appears to have been recognised and acted upon for a very long time, and seems to me to stand upon a perfectly sound ground. That principle is, that persons intrusted with the performance of a public duty, discharging it gratuitously, and themselves taking no personal share in the mode of its performance, are exempted from liability for the negligent acts of the persons employed by them. *Hall v. Smith*, 2 Bingham 156 (E. C. L. R. vol. 9), 9 J. B. Moore 228 (E. C. L. R. vol. 17), is cited as the first of a series of authorities ending with *Duncan v. Findlater*, 6 Clark & Fin. 894, where that principle of the exemption of public trustees has been fully recognised. In the last-mentioned case, a supposed difference between the English and the Scotch law upon this subject was pressed upon the House of Lords; but it was held that the exemption from liability was the same in both. Lord Cottenham, C., there says: "When trusts are created, it is plain that for the public benefit the Courts should have a common principle of dealing with them, on which might be engrafted such special rules as it seemed advisable to adopt on account of the particular circumstances of one or other of the two countries. In England we have long held that the trustees of a turnpike-road are not liable in cases *of this sort: *Harris v. Baker*, 4 M. & Selw. 27; *Humphreys v. Mears*, 1 M. & R. 187 (E. C. L. R. vol. 17); *Hall v. Smith*, 2 [*205 Bingham 156, 9 J. B. Moore 226. In all these cases it was distinctly held that such trustees are not answerable but for their own personal default." The circumstances of *Duncan v. Findlater* were very similar to those of the present case. There, a large open drain on the side of the turnpike-road, which had been constructed by an adjoining proprietor, and was conceived by the road trustees to be very dangerous to passengers, was in the course of being filled up under the superintendence of the surveyor of the trust, and under general directions from the trustees, to the effect that the drain should be filled. The stones which were intended to be used in this operation were carted to the spot and placed in the immediate neighbourhood of the ditch. They were piled up upon the footpath and upon a part of the road. Late in the evening of that day, the pursuer passed the spot in question on his return from Dundee. It happened that a carter was in the middle of the road, to whom the pursuer called out to know whether there was room to pass. He was told that he might pass. The night was extremely dark: there were no lights in the pursuer's gig: the wheels came in contact with the stones, the gig was overturned, and thus the accident happened. The part of the case which makes it a sound decision and applicable here, is, that no evi-

dence was offered to connect the trustees directly with the cause of the accident. It was not pretended that they were in the slightest degree accessory to the placing of the stones on or near the road. They had given a general direction that the drain should be filled; but they gave no direction as to the particular mode in which the operation should be carried through. They intrusted, as was usual, the execution of the whole details to their surveyor, and the operation

*206] was *carried on under his direction by persons whom he employed. And the decision of the House was, that the trustees were not responsible for the injury thus occasioned. That is the principle on which the defendants rely for their exemption from liability here: they were guilty of no personal default. In *The Southampton and Itchin Floating-Bridge Company v. The Southampton Local Board of Health*, 28 Law J., Q. B. 41, the defendants directed the sewer to be emptied so as to be injurious to the plaintiffs. The thing complained of was not negligence in the performance of a duty. If it was a violation of the law, it was their act. So, in *Alston v. Scales*, 9 Bingh. 3, 2 M. & Scott 5, where the surveyor of the highway was held liable for cutting away a portion of the plaintiff's land, the act was wrongful and done under the personal direction of the defendant. *Scott v. The Mayor, &c., of Manchester*, 2 Hurlst. & N. 204,† does not fall within the class of cases which proceed upon the ground that the defendants are public trustees acting gratuitously: the defendants manufactured gas for the supply of the city of Manchester, deriving a profit therefrom and from the sale of coke; they were therefore liable just as any private manufacturer of gas would be. The case of *Gibbs v. The Trustees of the Liverpool Docks*, 3 Hurlst. & N. 164,† falls within something like the same principle. Although the trustees personally derived no profit from the dock-dues, yet all persons coming with their vessels to the docks paid for entering therein, and had a right to expect the accommodation for which they paid. The Company allowed the entrance to be and continue unsafe, from neglect to cleanse it, and the plaintiff's vessel in consequence grounded and was damaged. The case was the same, in substance, as that of *Parnaby v. The Lancaster Canal Company*, 11 Ad. & E. 223 (E. C. L. R. vol. 39), 3 P. & D. 162. There, *the declaration stated that, by the

*207] Canal Act (32 G. 3, c. ci.), the Company was formed to make and maintain the canal, with power to take tolls, and all persons had free liberty to navigate the canal; and, if any boat should be sunk in the canal, and the owner or person having care of it should not without loss of time weigh it up, it was by the statute to *be lawful* for the Company to weigh it up, and detain it till payment of expenses; that the Company completed the canal, and took tolls on it; that a boat sunk in the canal, so that vessels passed with difficulty in the day, and at night were in danger of running foul of it; and that, although the Company could and ought to have requested the owner, &c., to weigh it up, and, if that was not done without loss of time, could and ought to have weighed it up, and in the mean time have caused a light or signal to be placed to enable boats to avoid it, yet the Company did not cause the owner, &c., to weigh it up, nor themselves weigh it up, nor place a light or signal; whereby the plaintiff's boat, navigating the canal, ran foul of the sunken boat and was damaged:

and it was held by the Exchequer Chamber (affirming the judgment of the Court of Queen's Bench), that the declaration disclosed a sufficient duty and breach,—the Court of error holding that such duty was not created by the clause enabling the Company to weigh the boat, but arose upon a common law principle that the owners of a canal, taking tolls for the navigation, were bound to use reasonable care in making the navigation secure, the want of which reasonable care might be collected from the declaration, although the complaint was ostensibly founded on the statute. *Sutton v. Clarke*, 6 Taunt. 29 (E. C. L. R. vol. 1), 1 Marsh. 429 (E. C. L. R. vol. 4), and *Boulton v. Crowther*, 2 B. & C. 703 (E. C. L. R. vol. 9), 4 D. & R. 195 (E. C. L. R. vol. 16), are also authorities to show that trustees acting gratuitously in the performance of a public duty under *an Act of parliament, are not responsible for acts done by them within [*208 the scope of their duty, provided they are personally guilty of no negligence or oppression; but they have no very proximate bearing upon the present case. The defendants not having exceeded the limits of their duty, or been guilty of any negligence or personal wrong, the case falls within the principle of *Hall v. Smith*, confirmed as it has been by *Humphreys v. Mears* and *Duncan v. Findlater*.

WILLES, J., concurred.

BYLES, J.—I am of the same opinion. In *Scott v. The Mayor, &c., of Manchester*, 2 Hurlst. & N. 204,† Cockburn, C. J., says that the case is distinguishable from those cited by the defendants, because, though the individuals composing the corporation acted gratuitously, yet the corporation and the township derived a profit from the carrying on of the works. That was the ground upon which the judgment of the Court of Exchequer was confirmed by the Exchequer Chamber. With regard to *Hall v. Smith*, although it was animadverted upon by the Lord Chief Baron, and by Alderson, B., in *Scott v. The Mayor, &c., of Manchester*, 1 Hurlst. & N. 59,† it was distinctly recognised as a binding authority by Lord Tenterden in *Humphreys v. Mears*, and by Lord Cottenham in *Duncan v. Findlater*. And it is to be observed that the principle was not so well settled then as it has been since. In *Whitehouse v. Fellowes*, 10 C. B. N. S. 765 (E. C. L. R. vol. 100), the defendants were personally cognisant of and parties to the works which caused the injury complained of; therefore this question did not arise there. Here, the defendants are public officers, acting gratuitously and compulsorily, and having no funds out of which the damages could be paid; and the cases show, that, under such *circumstances, being guiltless of personal negligence, [*209 they are not liable. I cannot entertain any doubt that the objection is a valid one, and that the verdict should be entered the other way.

Rule absolute.

That those charged with the repair of the public roads or streets are responsible at common law for the consequences of their negligence, if their liability be not qualified by the statute imposing it (*Mower v. Leicester*, 9 Mass. 247), is a familiar doctrine: *Rex v. Sheffield*, 3 Term Rep. 106; *Rex v. Kingsmore*, 2 B. & C. (9 E. C. L.) 190; *Wheeler v. Troy*, 20 N. H. 77; *Bartlett v. Crozier*, 15 Johnson (N. Y.) 250; 17 Id. 439; *Erie City v.*

Schwingle, 10 Harris (Pa.) 384; City of Dayton v. Pease, 4 Ohio State R. 80; but there is some conflict of authority in this country as to their responsibility for the negligence of the servants of one employed by them either generally, as in the principal case, or as a contractor to do specific work. It has been very generally decided here that *Bush v. Steinman*, 1 Bos. & Pul. 404, is no longer law, and that, to quote the language of Cockburn, C. J., in *Gray and Wife v. Hubble & Pullen*, 32 L. J., N. S., Q. B., 1863, cited by Strong, J., in the late case of *Painter v. The City of Pittsburgh*, 3 Am. Law Reg., N. S., 350, 1864—"if a person in the exercise of his rights as a private individual, or of those conferred upon him by statute, employs a contractor to do work, and the latter is guilty of negligence in doing it, the contractor, and not the employer, is liable." The American authorities upon this point are collected in a valuable note to the case of *Painter v. The City*, *ut supra*. In New York the leading case is *Blake v. Ferris*, 1 Seld. 48, which has since been followed in *Peck v. The Mayor*, 4 Seld. 222; *Kelly v. The Mayor*, 1 Kern. 432, s. c. 4 E. D. Smith 291; *Potter v. Seymour*, 4 Bosw. 140, and others. In Massachusetts the same rule was established in *Hilliard v. Richardson*, 3 Gray 349, which contains "the most exhaustive examination of the point to be found in any case;" while it was also adopted in *Barry v. St. Louis*, 17 Mo. 129; *De Forest v. Wright*, 2 Mich. 368; *Carman v. Railroad Co.*, 4 Ohio State Rep. 399; *Scammon v. Chicago*, 25 Ill. 424, and others. In *Painter v. Pittsburgh*, and *Barry v. St. Louis*, the principle was successfully invoked to shield a municipal corporation from the consequences of an accident caused by a failure to put proper guards around an excavation in the street—that failure being treated

as the negligence of the contractor's servants—but in New York a distinction was taken in *Storrs v. The City of Utica*, 17 N. Y. (3 Smith) 104, which materially qualifies the rule enunciated in *Blake v. Ferris*, and it was held that the corporation cannot escape responsibility by interposing the contract made for the very thing which creates the danger. The distinction was thus stated in *O'Rourke v. Hart*, 5 Bosw. 511: "Where the injury has resulted from some dangerous condition in which the defendant had put the street, and that condition, and not the means by which it was created, had caused the injury, then it might be said the defendant was the author of the mischief, as he created a condition of things which, in the very state of things he had contracted for, caused the injury." Hence the contractor, and not the corporation, would be liable for an accident caused by the negligence of his servants in the execution of the work, but the corporation, and not the contractor, for one resulting from the condition of the street: and this would seem to be the necessary result from the case of *The City of Buffalo v. Holloway*, 3 Seld. 493, in which it was decided that a contractor, under a contract to construct a sewer, is under no obligation to the corporation employer to take measures to prevent persons from falling into the ditch while in the process of construction. That this is the settled law in New York, would appear from the fact that the liability of the corporation does not seem to have been even questioned in the last case on the subject (*Grant v. City of Brooklyn*, 41 Barb. 381). In *The City of Chicago v. Robbins*, 2 Am. Law Reg., N. S. 529, however, the Supreme Court of the United States decided that an excavation made in the public street would become a nuisance, if not properly guarded, and the one making it would be liable to those injured by

the want of proper precaution. In this case, too, the employer of the contractor was not allowed to screen himself by interposing the contract, though Strong, J., suggests (*Painter v. The City*), that he had the right, which he exercised, to supervise the work, and was "held liable apparently for his own negligence."

Of course if the injury arises "from the nature of the work contracted to be done, and not from a failure to execute it carefully," the corporation is everywhere held liable: *Ellis v.*

Sheffield Gas. Co., 2 El. & Bl. 767 (E. C. L. R. vol. 75); *Lockwood v. New York*, 2 Hilton (N. Y. C. P.) 66; *Leman v. The Mayor*, 5 Bosw. 414; *St. Paul v. Seitz*, 3 Minnesota 297, and many other cases.

It should perhaps be added that in *James v. San Francisco*, 6 Cal. 528, it was held that the obligation to keep the streets in repair is necessarily suspended while they are undergoing such alterations as, for the time, make them dangerous, and if an injury results, the contractor and not the city is liable.

GEORGE RANSLEY WHITE and SARAH ELIZABETH his Wife, and ROBERT KING CROSS and LILLA PHILIPPS his Wife, Appellants; WILLIAM GREENISH, Respondent. Nov. 18.

By a deed of settlement of the 7th of August, 1832, a farm was conveyed to A. for life (subject to a term of 1000 years), with power to lease for three lives, with a remainder over which ultimately became vested in B. and C. The term of 1000 years was created for the securing a sum of 3000*l.*, and was at the time of such settlement vested in two trustees, one of whom was A., the tenant for life. In exercise of the leasing power, A. granted a lease of the farm for three lives, under which lease the plaintiff (below) became tenant, subject to the rent thereby reserved, and which rent was paid by the plaintiff (below) to B. and C. (or to R. & D., their attorneys) upon their coming into possession of the property.

Subsequently, R. & D., as the attorneys for B. and C., wrote to the plaintiff (below) stating that the legal estate under the term for 1000 years was in J. S., and directing him to pay the rent to J. S.; and, in consequence of that communication, the plaintiff (below) allowed J. S. to recover judgment against him in an action for rent under the lease. B. and C. afterwards distrained for rent as due to them; whereupon the plaintiff (below) brought replevin, and a case was stated by the County Court Judge for the opinion of this Court:—

Held, that, as the term of 1000 years had (as to one moiety) merged in A. and B., and C. had therefore a right to distrain for a moiety of the rent, the effect of the representation by R. & D. would not estop B. and C. from recovering rent which the plaintiff (below) had not paid in consequence of such representation, or had not made himself liable to pay under the judgment obtained against him by J. S.

Whether the representation by R. & D. was binding on B. and C. as an estoppel, they being married women and consequently incapable of appointing attorneys,—*quære?*

THIS was an action of replevin brought in the County Court of Pembrokeshire by William Greenish, plaintiff, against George Ransley White and Sarah Elizabeth his wife, and Robert King Cross and Lilla Philipps his wife, defendants. The taking by the defendants was admitted under a warrant of distress for rent alleged to have been due for the farm of Cotts, in the parish of Hasgward, in the county of Pembroke; and it was alleged on the part of the plaintiff that the defendants were not possessed of the legal estate, which was [*210
*alleged to be in one Abraham James Nisbett Connell.

Judgment was given for the plaintiff, with 3*l.* 3*s.* damages, and against this judgment the defendants appealed.

The following documents and facts were admitted before the trial:—
Letter from Ridgway to John Arnold, 14th April, 1857.

Payment by John Arnold of 14*l*. on account of rent of Cotts Farm to Messrs. Powell & Co. on or about the 14th of September, 1857.

That Messrs. Powell & Co. were then the agents of Ridgway & Drake, who acted for the Misses Langharne, and the sending of the letter of the 17th of September, 1857, and the receipt by Ridgway.

Copies of the following wills, without production of the originals, admitted to be duly executed,—1. Will of John Philipps Langharne,—2. Will of John Edmund Philipps Langharne,—3. Will of Sir William Philipps Langharne.

Death of the testators; and death of Rowland Henry Philipps Langharne without issue.

That Sarah Elizabeth White and Lilla Philipps Cross are at present the only surviving legitimate children of Sir William Philipps Langharne Philipps.

Death of Charles Allen Philipps, the trustee.

Indenture of settlement of 7th August, 1832.

Lease to Benjamin Harries.

Assignment of same by Benjamin Harries to Thomas Harries.

The like from Thomas Harries to John Arnold.

Underlease from Arnold to Howell.

Assignment from Edwardes Tucker to Sir William Philipps Langharne Philipps and Nathaniel Philipps.

*211] *Death of Nathaniel Philipps.

Administration with the will annexed of Sir William Philipps Langharne Philipps to Lilla Philipps Langharne.

Authority to distrain, dated 4th June, 1860.

The taking and place of taking, and also the property in the goods in the plaintiff.

Correspondence between Powell & Co. and Ridgway & Drake and Hare & Whitfield on each side; and that such of the letters as are written to or addressed to Henry Matthias were so written or received to or by him as agent of Messrs. Ridgway & Drake.

Notices to admit and produce on each side.

Copy writ of summons in an action of Connell *v.* Arnold, dated 12th of March, 1859, and that the rent endorsed as particulars was claimed in respect of Cotts Farm.

Office-copy of judgment in Connell *v.* Arnold, and amount thereof, and that same was in respect of the rent endorsed on the writ of summons in same action, dated 16th of July, 1860.

It was also admitted that Dr. Connell had given Arnold notice to pay the rent to him.

The case, as settled by the Judge of the County Court, set forth the title of the defendants to the lands in question, together with the encumbrances, so far as they affected the case; the title under which the plaintiff occupied the land in question; the correspondence and notices produced or afterwards forwarded to the judge by consent; and the substance of the oral evidence given at the trial, as follows:—

John Philipps Langharne, by his will, dated October 21st, 1813, devised the tenement in question to William Edwardes Tucker and Charles Allen Philipps, their executors, administrators, and assigns, for 1000 years, in trust to raise and levy or borrow and take up

*at interest and pay (amongst other sums) the sum of 3000*l*. with interest at 5*l*. per cent. to his daughter Elizabeth Philipps Langharne, now Elizabeth Philipps Greene, widow, and, subject to the said term and trusts thereof, to his eldest son, John Edmund Philipps Langharne, in fee simple. [*212

The testator died in June, 1814, without having revoked or altered his said will.

The said John Edmund Philipps Langharne, by his will dated December 10th, 1816, devised the tenement in question to the use of William Edwardes Tucker and Charles Allen Philipps, as joint tenants, in fee simple, and directed a settlement thereof, with power of leasing, to be made by them.

The testator died in December, 1819, without having revoked or altered his will as above stated; and thereupon William Edwardes Tucker and Charles Allen Philipps entered into the possession or receipt of the rents and profits of the tenement in question, and they and the survivor of them so continued till the execution of the indenture next hereinafter stated.

Charles Allen Philipps died before the year 1832.

By a decree of the Master of the Rolls, made on the 11th of December, 1821, in a suit in which the said William Edwardes Tucker and Charles Allen Philipps were the plaintiffs, and Rowland Henry Langharne, William Philipps Langharne, James James and Anna Maria Louisa Philipps his wife, Elizabeth Philipps Langharne, and Thomas James, were the defendants,—it was ordered, among other things, that so much of the debts and legacies of the said John Philipps Langharne and John Edmund Philipps Langharne as their respective personal estate should be insufficient to pay should be raised by mortgage or sale of their real estate, and that the money to be raised thereby should *be applied in payment of so much of the debts of the testator John Philipps Langharne as his personal estate should not be sufficient to pay, and then in payment of so much of the legacies given by his will as his personal estate would not be sufficient to pay, and in payment of the charges of 3000*l*. each to his children, and then in payment of so much of the debts and legacies of the said testator John Philipps Langharne as his personal estate would not be sufficient to pay; and that such real estate, subject to such mortgage, or the residue thereof, and in case of sale, should be settled and conveyed by the said Edwardes Tucker and Charles Allen Philipps, the trustees, to the uses in the will of the said testator John Edmund Philipps Langharne mentioned. [*213

In pursuance of the said decree, by indenture dated January 13th, 1832, William Edwardes Tucker demised the tenement in question to William Philipps Langharne and the said Nathaniel Philipps, their executors, administrators, and assigns, as expressed in the said deed, for the then residue of a term of 1000 years created by the said will of the said John Philipps Langharne.

Between January, 1832, and August, 1832, the said William Philipps Langharne, who was a brother of the testator John Edmund Philipps Langharne, assumed the name of Philipps, and became Sir William Philipps Langharne Philipps, Bart.

By indenture of release and settlement dated August 7th, 1832, grounded on the usual bargain and sale for a year (precedent thereto),

the said William Edwardes Tucker, in pursuance of the directions for a settlement contained in the secondly stated will and the said decree in *Tucker v. Langharne*, released the tenement in question to John Hill Harries and Amos Crymes (the bargainees for a year thereof), *214] their heirs *and assigns (subject to the term of 1000 years created by the will of John Philipps Langharne, deceased), subject to the mortgages mentioned in the schedule to the now reciting deed,—one of which mortgages therein mentioned is that to which the tenement of Cotts was subject by the deed bearing date the 13th of January then last for securing to Nathaniel Philipps and Sir William Philipps Langharne Philipps, as trustees for and on behalf of Elizabeth Philipps Greene, the sum of 3000*l.* and interest,—To the use and intent that several life annuities, among others the annuity of 50*l.* to the said Elizabeth Philipps Greene, might be had thereout as rent-charges, and powers of entry and distress, and perception of rents and profits for the recovery thereof; and, subject thereto, to the use of the said Sir William Philipps Langharne Philipps for life, with remainder to the use of trustees during his life, upon the usual trusts to preserve contingent uses, with remainder to the use of the first and other sons of Sir William Philipps Langharne Philipps in tail, with remainder to the use of all the daughters of Sir William Philipps Langharne Philipps as tenant in common in tail, with cross-remainders between them as tenants in common in tail, with remainders over; and power was thereby given to Sir William Philipps Langharne Philipps during his life to demise the tenement in question to any person not exceeding three lives or twenty-one years in possession, at the best yearly rent or rents, payable half-yearly, without fine.

Sir William Philipps Langharne Philipps survived his co-trustee under the deed of the 13th of January, 1832, and died in January, 1850. Letters of administration to his effects, with the will annexed, were granted to his daughter Lilla, now Lilla Philipps Cross, and one of the defendants.

*On the 15th of January, 1858, the said Lilla Philipps *215] Langharne (she having dropped the name of Philipps), by a deed, reciting that the 3000*l.* secured for the benefit of Mr. and Mrs. Greene by mortgage on the lands (amongst others) of Cotts was unpaid, and that the parties entitled to the premises under the limitations contained in the will of John Edmund Philipps Langharne had given notice of their intention to pay off the mortgage, that she had applied to Abraham James Nisbett Connell, and that he had consented to advance the 3000*l.* upon having the said mortgage assigned to him, assigned the mortgage to Connell, and the 3000*l.* subject to the equity of redemption.

The said Nathaniel Philipps died afterwards, but before the execution of the indentures of the 23d and 24th of January, 1835, herein-after mentioned.

Sir William Philipps Langharne Philipps died on the 17th of February, 1850. He left one son and four daughters, his only children, him surviving, viz. Godwin Philipps Langharne Philipps (who on his father's death became Sir Godwin Philipps Langharne Philipps, Bart.), his only son, and Sarah Elizabeth Langharne Philipps, Lilla Philipps Langharne Philipps, Lavinia Philipps Langharne Philipps, and Char-

lotte Philipps Langharne Philipps, his four daughters: and Sir William Philipps Langharne Philipps had not had any other child who left issue living at the decease of Sir William Philipps Langharne Philipps.

Lavinia Philipps Langharne Philipps and Charlotte Philipps Langharne Philipps respectively afterwards died spinsters.

Sir Godwin Philipps Langharne Philipps died on the 18th of February, 1857, an infant, without issue and unmarried, and without having done anything to bar his estate tail in the tenement in question.

*The said Sarah Elizabeth Langharne Philipps, a defendant, [216 after the death of her father, intermarried with and is now the wife of the defendant George Ransley White.

The said Lilla Philipps Langharne Philipps, a defendant, after the death of her father, intermarried with and is now the wife of the defendant Robert King Cross.

By indenture of lease and release, dated respectively the 23d and 24th of January, 1835, Sir William Philipps Langharne Philipps conveyed his life estate under the above-stated indenture of release and settlement of the 7th of August, 1832, in the tenement in question, to John Walters, Thomas Beynon, and Charles Brigstocke, upon trust by way of mortgage thereof, and leaving the equity of redemption in himself.

By an indenture of lease dated March 25th, 1837, and made between the said Sir William Philipps Langharne Philipps of the first part. John Walters, Thomas Beynon, and Charles Brigstocke, of the second part, and Benjamin Harries, of the third part, and sealed with the seals of the respective parties, it was witnessed that Sir William Philipps Langharne Philipps, in exercise or execution of a certain power or authority for that purpose given and reserved to him by the will of John Edmund Philipps Langharne, and of all other powers and authorities enabling him in that behalf, demised, leased, and to farm let, and John Walters, Thomas Beynon, and Charles Brigstocke, according to their respective estates and interests in the premises, granted, demised, and confirmed unto Benjamin Harries a certain farm called Cotts, in the parish of Hasguard, in the county of Pembroke, to hold unto Benjamin Harries, his executors, administrators, and assigns, from the day of the date thereof *for the natural [217 lives of Thomas Harries and George Harries, sons of the lessee, and Martha Davies, and the life of the survivor of them (one or more of whom is still living), at the yearly rent of 145*l.* thereby reserved, payable half-yearly, on the 25th of March and 29th of September.

It appears by the last-mentioned lease that the said Benjamin Harries was in occupation of the premises when the lease was executed.

By lease and release, dated the 20th and 21st of November, 1840, the said Benjamin Harries assigned his lease to his son, Thomas Harries.

By deed of July 20th, 1852, the said Thomas Harries assigned the lease to John Arnold; and by indenture dated the 27th of February, 1857, Arnold granted an underlease of the tenement to Howell, by way of mortgage, and Howell entered as mortgagee. The mortgageor,

Arnold, by the said deed became tenant to Howell; and Arnold underlet the land in question to the present plaintiff.

Copies of the deeds of March 25th, 1837, of 20th and 21st of November, 1840, of July 20th, 1852, and the 27th of February, 1857, and of the said deeds of 13th of January, 1832, and the 7th of August, 1832, were annexed to and were to be taken as part of the case.

On the 25th of September, 1857, John Arnold paid rent to the defendants or their agents, having been called upon so to do by a letter from Messrs. Ridgway & Co. dated the 14th of April, 1857.

The following correspondence took place between Messrs. Ridgway & Drake, the agents of the defendants, the said John Arnold, the assignee of the lease, and the other persons named, at the times the letters respectively purport to bear date. Mr. Greene mentioned in *218] such correspondence was the annuitant *entitled to an annuity of 50*l.* charged upon the said tenement.

"To Mr. John Arnold.

"14th April 1857.

"Sir,—In consequence of the death of Sir Godwin Langharne, the rent of your farm of Cotts will for the past half-year and in future be payable to his sisters, Miss Sarah and Miss Lilla Philipps Langharne, and, by their authority, to me. You will be kind enough to let me know what payments you have hitherto been accustomed to make out of your rent, because for the past half-year and in future you will not be troubled to make them, but will pay your full rent to me, and I will make the payments in question. I shall be obliged by your answer by return of post, as I leave for Haverfordwest in a few days.

"ALEXANDER RIDGWAY."

"Harmonston, April 17, 1857.

"Alexander Ridgway, Esq.

"Sir,—In answer to your letter of the 14th instant, I beg to say I had no payments to make; but Mrs. Greene's annuities are paid from the other farms. I have paid Mrs. Greene in February last, an account of Michaelmas rent, 25*l.* Also to Mr. Joseph Lewis 1*l.* 5*s.*, late agent, by Mrs. Greene's request. I shall feel happy in doing as you request, hoping that you will allow me the same privileges as other landlords do, that is, Christmas and June to pay the rent.

"JOHN ARNOLD."

'Rent 30*l.*

"Tithes 15*l.*

"County road rate $\frac{1}{2}$ *d.* in the pound.

"Road-rate . . . 1*s.* 4*d.*

"Poor-rate . . . 2*s.*

"Land-tax . . . 2*l.*"

*"Haverfordwest, April 17, 1857.

*219] "A. Ridgway, Esq.

"My dear Sir,—I enclose a draft on Messrs. Williams, Deacon & Co., for 14*l.*, balance of Mr. Arnold's rent for the Cotts Farm, as above. He has requested me to say that he is threatened (by Mr. Joseph Lewis) with a distress, in the event of his not paying Mrs. Greene her half-year's annuity on the 29th of September instant, and wishes to know whether he is to pay it or allow a distress to be put in. He will make no payment, except to avoid a distress, without your instructions, and trusts to receive the usual term of three months

after the rent becomes due before being required to pay; or, in other words, that you will fix days for receiving at Christmas and Midsummer, instead of those on which the rent is reserved by the lease. Mr. Evans called on Saturday, in accordance with his promise, but was not prepared to make any payment. Should he not pay on Saturday next, I think a distress should be put in, and will thank you to let me know in the mean time the names of Mr. and Mrs. White and Miss Langharne.

"HENRY MATHIAS."

"1857. 25th March.	Half-year's rent then due for Cotts Farm in the occupation of John Arnold	72	10	0
7th March.	Paid Mrs. Greene in advance on account of interest due 25th March on her mortgage	25	0	0
20th June.	Paid Mrs. Greene her $\frac{1}{2}$ year's annuity due 25th March last	21	13	4
	Income-tax on 50 <i>l.</i>	3	6	8
		25	0	0
	The Rev. S. Brown $\frac{1}{2}$ year's tithe	7	10	0
12th Sept.	Cash	14	0	0
	Income-tax on 16 <i>l.</i>	1	0	0
		15	0	0
		72	10	0

*On the 23d of February, 1858, a letter was written to the tenant, Arnold, by Messrs. Ridgway & Drake, of which the following is a copy:—

"London, 23d Feb. 1858.

"Mr. John Arnold.

"Dear Sir,—The Bank-bills for 33*l.* and 24*l.* were duly received and placed to the credit of your rent. When the balance is remitted, you shall have the regular receipt. Be kind enough to bear in mind that Mr. Powell has not the slightest power to interfere with you, and never had. Although you were frightened into paying money to Mrs. Greene before, and we were willing to assist you out of that difficulty, we shall not permit such a thing again. On the contrary, we have no hesitation in holding you harmless from any attempt he may make to put in a distress as he threatens. He dares not do it; and you may tell him so.

"Miss Lilla Langharne is Mrs. Greene's trustee; and she alone has the power of enforcing payment of Mrs. Greene's money: but, by a deed executed in January, the farm of Cotts became cleared of Mrs. Greene, her trustee, her mortgage, and her impertinence; and she has no more right to talk to you about your rent than Sir John Owen. The present mortgagee is a gentleman named Connell, from whom you will receive a notice about the payment of your rent, as he intends to cut the matter short by receiving it himself, which he is at liberty to do, as he stands in the same position as Sir W. Langharne did at his death.

"Be kind enough to write us by return of post what course you intend to take, because on that will depend our own action in respect to your farm. If you pay your rent according to the notice you have received from us, you have nothing to fear: but, if not, we *cannot disguise from you the fact that matters will be brought to a very speedy issue.

"RIDGWAY & DRAKE."

The notice first referred to in Messrs. Ridgway & Drake's letter of the 23d of February, 1858, was in the words following:—

"I hereby give you notice, that, by an indenture bearing date the 18th of January, 1858, and made between Lilla Philipps Langharne, of No. 16, Great Tufton Street, in the county of Middlesex, spinster, of the one part, and myself of the other part, for the consideration therein mentioned, she the said Lilla Philipps Langharne, in whom the sum of 3000*l.* hereinafter mentioned was then vested, and also the hereditaments and premises hereinafter mentioned, and on which the same sum is secured for the residue of a term of 1000 years, as the administratrix of her father, the late Sir William Philipps Langharne Philipps, who was the surviving trustee of the settlement made on the marriage of John Greene, Esq., and Elizabeth Philipps his wife, and to which said Sir William Philipps Langharne Philipps and his then co-trustee the said hereditaments and premises were assigned by an indenture bearing date the 13th of May, 1832, for the said term of 1000 years, subject to a proviso for redemption on payment of the sum of 3000*l.* thereby secured, and interest, did transfer, amongst other hereditaments, the farm, hereditaments, and premises in your occupation, called Cotts, for the remainder of the said term, and the said sum of 3000*l.*, and the interest thereby secured to me, my executors, administrators, and assigns: And I hereby give you further notice to pay your rent in future to me or to my agent authorized by me for the time being to receive the same, and to no other person or persons whomsoever. Dated the 11th day of March, 1858.

"A. J. N. CONNELL, M. D."

*222] "Subsequently to such notice being given as aforesaid, an action was brought in the Court of Exchequer by Dr. Connell for the sum of 160*l.* 10*s.*, parcel of the arrears hereinafter mentioned to have been distrained for by the defendants; and a judgment for that amount (by default) was obtained on the 20th of May, 1859, for all rent up to Michaelmas, 1858. Afterwards, a further sum of the said rent became due and in arrear, and so remained up to the time of the distress hereinafter mentioned. And thereupon the distress in respect of which the present proceedings arise was on the 12th of June, 1860, levied by one James Jones, in pursuance of the following warrant of distress:—

"Mr. James Jones, of Haverfordwest, bailiff.

"We do hereby authorize and empower you to seize and distrain the goods, chattels, stock, and crops of John Arnold for the sum of 276*l.* 0*s.* 7*d.*, balance of rent due on the 25th March last under an indenture of lease dated the 25th day of March, 1837, and made between Sir William Philipps Langharne, Bart., of the first part, John Walters, Thomas Beynon, and Charles Bigstock, of the second part, and Benjamin Harries of the third part, for and in respect of the messuage, lands, and hereditaments called Cotts, situate and being in the parish of Hasguard, in the county of Pembroke; and for so doing this shall be your sufficient warrant and indemnity. Dated this 4th day of June, 1860. Yours, &c.

"GEORGE RANSLEY WHITE.

"SARAH ELIZABETH WHITE.

"ROBERT KING CROSS.

"LILLA PHILIPPS CROSS.

"I hereby authorize and confirm the above distress. Dated this 4th day of June, 1860. Yours, &c.

"A. J. N. CONNELL."

*The warrant by which the distress was authorized was amongst the admissions made by the parties: but no notice [*223 was taken by counsel of the signature to the warrant; nor, after the case was reserved for consideration by the Court, was the warrant of distress forwarded with the other documents to the Judge. He naturally supposed, under such circumstances, that the warrant of distress was in the usual form, and signed by the defendants alone: nor was it until the case was sent to him for settlement with a view to the appeal, that he was aware that the warrant of distress had been signed by any other than the defendants.

The said George Ransley White, and Sarah Elizabeth White, Robert King Cross, and Lilla Philipps Cross, are the defendants in the present action of replevin: and the said A. J. N. Connell is the person named Connell mentioned in the letter of Messrs. Ridgway & Drake, and in the notice therein referred to.

The distress was afterwards levied for the rent mentioned in the said authority to distrain, being 276*l.* 0*s.* 7*d.*: but the notice of distress which was served upon the plaintiff purported to be in the names of George Ransley White and Sarah Elizabeth White his wife, and Robert King Cross and Lilla Philipps Cross his wife (the defendants in this action), alone.

The goods were replevied, and the present replevin suit instituted.

The cause came on for trial on the 17th of July, 1860; and in the course of the trial the documents, matters, and facts hereinbefore stated were proved or admitted.

The judgment obtained in the Court of Exchequer by Connell against Arnold was included in the list of admissions agreed upon before and acted upon at the trial. The admissibility of the last-mentioned *judgment in evidence was objected to at the trial [*224 by the defendant's counsel, on the ground that it was *res inter alios acta*, and that there was no privity between the parties thereto and the present defendants. The objection, however, was overruled by the Judge, as it had been previously arranged by written agreement between the parties that it should be admitted and received in evidence, and now forms one of the grounds of the present appeal: and Mr. Hare proved, that, although he had applied to Arnold, the tenant of the land in question, on the part of Dr. Connell, for rent, he had received none.

Mr. Henry Mathias, a member of the firm of Powell, Mathias & Evans, solicitors at Haverfordwest, stated that he acted in the country for Mr. Ridgway, who was the agent of the defendants, the firm acting at that time for Mr. Greene; but, when the interests of the defendants and Mrs. Greene became conflicting, he declined any longer to act for Mr. Ridgway. He proved that he received in 1857 rent from Arnold, under whom the plaintiff immediately claims, and paid the balance after paying Mrs. Greene's annuity and other payments to Mr. Ridgway as agent of the defendants (*vide* letter of 17th April, 1857, *ante*, p. 219). From the evidence of John Arnold it appeared that he had paid rent for the land in question to one Joseph Lewis, who used to send it to Mrs. Greene and to Sir Godwin Philipps, and subsequently that he had paid rent to Mr. Henry Mathias.

It appeared from the evidence of Mr. Evan Hare, a solicitor, that he

had acted for some time for the defendants and for Dr. Connell; that the demand under the warrant of distress the subject of this action was 276*l.* 0*s.* 7*d.*; but that, after the deduction of several payments to which the landowners were liable, it amounted to 228*l.* 3*s.* 1*d.*, which *225] sum included the *sum recovered by way of rent for the land in question by the judgment of the Court of Exchequer in favour of Dr. Connell. It also appeared from the evidence of this witness, that he had made application, on behalf of Dr. Connell, to Arnold, for rent in respect of the land in question, but had received none; that the judgment of the Court of Exchequer of May, 1859, in favour of Dr. Connell, included the rent for the land in question up to September, 1858; and that the rent distrained for by the defendants was for three years ending March, 1860.

The question for the opinion of the Court was, whether the plaintiff or the defendants were entitled to judgment in the said action.

Tomlinson (with whom was *C. E. Coleridge*), for the appellants.—The tenant for life under the settlement grants a lease for three lives. That lease being void, the admissions set out in the case clearly show that the relation of landlord and tenant between the lessee and those claiming under him and the appellants, the tenants in tail, was created. A semblance of difficulty arises from the term of 1000 years which was vested in William Philipps Langharne and Nathaniel Philipps as trustees, which, as to one moiety, became merged in the life estate of William Philipps Langharne, the other undivided moiety remaining in Nathaniel Philipps, whose representatives are not now known. In respect of the reversion in the one undivided moiety vested in them as tenants in tail under the original settlement, the appellants were clearly entitled to distrain. [BYLES, J.—What is the consequence if one of the two tenants of the term becomes the freeholder? Is it that the one moiety merges, and that his companion has the other moiety?] That the moiety of the term merged in the life estate, is clear from *226] *Sir Ralph Bovey's Case*, *Ventr. 193, cited *Vin. Abr. Merger* (G), pl. 16,—“The use of land is limited to A. for ninety-nine years, and that J., K., L., M., N., and O., who were feoffees to uses, should be seised to their own use in trust for A. and his heirs, with power to A. to alter and limit the trust as he should think fit. Afterwards A. on his marriage assigns the ninety-nine years' term to J. (one of the trustees) and W. R., a stranger, in trust for himself (A.) for life, remainder to his wife for life, remainder to the heirs male of their two bodies, and by the same deed limits the trust of the inheritance in the same manner. A. grants a rent-charge to Sir R. B. and his heirs, with power to enter, &c. A. and his wife die, leaving B. their son. The rent being in arrear, Sir R. B. enters. Then J. and the other trustee assign the term of ninety-nine years to B., who leased to the plaintiff in ejectment. The jury upon hearing the opinion of the Court found for the plaintiff for all save a sixth part; for, so much was drowned and surrendered by the assignment of A. to J., one of the six joint tenants of the reversion.” *Wiscot's Case*, 2 Co. Rep. 60 b, is to the same effect. “A., tenant for life, the remainder to B. and three others for life, the reversion to C. and his heirs expectant: C. levied a fine sur conusance de droit come ceo, &c., to A. and B., to the use of B. for life, and after his death to the use of B. in fee:

A. died, and afterwards B. died : and, whether the jointure was severed or not, so that, after the death of A., B. was tenant in common, was the question. And it was resolved that the jointure was severed; and this difference taken,—when the fee simple is limited by one and the same conveyance, there the one may have a fee simple and the other an estate for life, jointly; but, when they are first tenants for life, and afterwards one of them doth get the fee simple, or the fee simple doth descend to one, there the jointure is severed."

**Montague Smith*, Q. C. (with whom was *T. Allen*), for the respondent. [*227]—It cannot be denied that under the circumstances one moiety of the term did merge in Sir William Langhorne, the other moiety remaining in Nathaniel Philipps. But, at the same time, it is clear that all the parties treated this as a subsisting term, and that it vested in Dr. Connell,—a blunder to which the respondent was no party. It is submitted, however, that Dr. Connell having been held out to the tenants as the person entitled to the reversion, and having a right to receive the rent, and they having come in under Dr. Connell, it is too late for the appellants now to turn round and say that they were mistaken. [WILLIAMS, J., referred to *Doe d. Higginbotham v. Barton*, 11 Ad. & E. 307 (E. C. L. R. vol. 39), 3 P. & D. 194.] In *Pickard v. Sears*, 6 Ad. & E. 469 474 (E. C. L. R. vol. 33), 2 N. & P. 488, Lord Denman, delivering the judgment of the Court, says: "The rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." And that is confirmed by *Gregg v. Wells*, 10 Ad. & E. 90 (E. C. L. R. vol. 37), 2 P. & D. 296, and *Freeman v. Cooke*, 2 Exch. 654.† The letter of the 23d of February, 1858, from Messrs. Ridgway & Blake, the attorneys for the appellants, fully warranted the tenant in assuming that Dr. Connell alone was the person entitled to receive the rent: and it is not competent to them now to say that that representation was the result of mistake.

Tomlinson, in reply.—The utmost extent of the effect of the representation made by Ridgway & Blake would be to excuse the tenant for having in pursuance of their letter paid rent to Dr. Connell. It may be *conceded also, that suffering judgment by default in an action for the rent would be equivalent to payment. But the doctrine of *Pickard v. Sears* has never been held to apply to the conveyance of land, or to affect title. In *Lyon v. Reed*, 13 M. & W. 285, 309,† *Parke, B.*, in delivering the judgment of the Court of Exchequer, says: "The acts in pais which bind parties by way of estoppel are but few, and are pointed out by Lord Coke, Co. Litt. 352 a. They are all acts which anciently really were, and in contemplation of law have always continued to be, acts of notoriety, not less formal and solemn than the execution of a deed, such as *levy, entry, acceptance of an estate*, and the like." Besides, it must not be lost sight of that these parties were married women, incapable of appointing attorneys, and therefore not bound by any representation made by persons assuming to act in that capacity for them.

ERLE, C. J.—I am of opinion that our judgment in this case ought

to be for the defendants. The defendants avow the taking of the goods as a distress for rent; and the question is whether they had any right to distrain. It appears from the title which is set out in the case that the fee simple of the estate has been traced down to the defendants. There is a devise of the fee, and a settlement of the estate with a power of leasing for lives. Pending the duration of the life estate a lease was executed to the plaintiff for three lives, under which lease he entered; and the remainder in tail gives the defendants the rights of landlords in respect of the term thereby created. So stands the title as to the fee simple. With respect to the term of 1000 years created under the will of John Philipps Langharne in 1813, for raising portions for daughters, one moiety appears to have become merged in one of the defendants, the other being outstanding in an unknown party. As to that, there is a conveyance to Dr. Connell, to secure a sum of money advanced upon it by way of mortgage. We have nothing to do in a Court of law with Dr. Connell's rights under the conveyance to him, whatever those rights may be in a Court of equity. But we are to say whether, under these circumstances, the defendants can sustain their avowry of a right to distrain for the rent reserved by the lease in respect of which the plaintiffs may be said to have come in under them. Now, it is conceded that, if the defendants have the legal title to the reversion, though they in fact distrained for the whole rent, yet, if they are entitled to any part of it, they are entitled to judgment and a return, the rent being apportionable. Upon the statement in the case it is clear that as to a moiety the defendants had the legal estate and consequently a right to distrain. The case for the plaintiff was rested entirely upon a letter of the 23d of February, 1858, addressed by Messrs. Ridgway & Drake, acting as attorneys for one of the defendants, to the then tenant of the premises, Arnold, the effect of which letter was to represent that the legal estate was vested in Dr. Connell, in respect of the mortgage to him of the term of 1000 years before mentioned, and to direct that all future rent should be paid to him. As to so much of the rent as the plaintiff has paid or has made himself liable to pay to Connell in consequence of that representation, I agree with Mr. *Smith* and Mr. *Tomlinson* that the doctrine of estoppel, as it is commonly called, and which is supposed to have been first laid down in the case of *Pickard v. Sears*, 6 Ad. & E. 469 (E. C. L. R. vol. 33), 2 N. & P. 488 (though I think traces of it will be found in our law-books two or three centuries earlier), clearly applies. That doctrine is this, that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. So far I agree that that doctrine (qualified by the judgment of the Court of Exchequer in *Freeman v. Cooke*, 2 Exch. 654†) should have effect here, but no further. The party who made the representation, or on whose behalf it was made, should never be allowed to say, "Although I represented to you that which was false or mistaken, and by that representation induced you to pay or to become liable to pay rent to Connell, I now call upon you to pay it over again." The plaintiff

has suffered judgment to go against him at the suit of Connell for a part of the rent; and to that extent the distress cannot be sustained. But beyond that I for one am not inclined to give any effect to the letter of the defendants' attorneys. I was certainly much impressed with the observation of Mr. *Tomlinson* that the doctrine of *Pickard v. Sears* can have no application to a conveyance of land, or, in other words, cannot affect the title to land; and also with his remark that the letter in question was that of persons professing to be acting in the capacity of attorneys for married women, who properly speaking could not appoint an attorney. Upon the whole, however, I think we are safe in holding that the plaintiff is protected so far as he has acted upon the faith of that communication, but that, as to the balance, he is without protection. Something has been said about the hardship of distraining for the rent after that letter, without further notice. All I can say is, that the case is silent upon the point, though I am much inclined to think that there must have been a good deal of discussion between the parties which has not been *brought before the Court. But I must confess I feel no scruple upon the [*231 subject. If the plaintiff had, as is suggested, acted upon the faith of that letter, it would have been satisfactory to my mind to find that he had paid the rent to Connell. He has not, however, paid any one. I am not therefore deterred by any consideration of hardship from giving my judgment in favour of the defendants.

WILLIAMS, J.—I am of the same opinion. I must confess I do not feel at all pressed by the argument of Mr. *Tomlinson* as to the effect of there being an estate tail, which could not be put an end to without the observance of certain prescribed formalities, because the case which has been put forward by the plaintiff is one which does not dispute the existence of such estate tail, nor that the lease granted by the tenant for life in pursuance of the power would operate as an estoppel as between the landlord and the tenant so long as the latter retained possession under the former. The proposition submitted to us by Mr. *Smith* is free from all objections of that nature, if well founded. What the plaintiff says is in effect this,—I do not dispute your title as you allege it: but you by your attorneys gave me to understand that prior to your estate tail there was a term of 1000 years outstanding, to which your estate tail was subject, and which term had become vested in Dr. Connell in the character of mortgagee, and that term was subsisting at the time of the making of my lease, and therefore that Dr. Connell, according to the case of *Doe d. Higginbotham v. Barton*, 11 Ad. & E. 307 (E. C. L. R. vol. 39), 3 P. & D. 194, had power to turn out the tenant, by determining the estate of his landlord, in respect of his being a mere tenant at will to the mortgagee, unless he chose to attorn to him. The question is whether Mr. *Smith* has succeeded in *making out that proposition. I am [*232 of opinion that he has not. Not to mention the difficulty of applying the rule in *Pickard v. Sears*, 6 Ad. & E. 469 (E. C. L. R. vol. 33), 2 N. & P. 488, to the case of a representation made by a person assuming to act as attorney for a married woman, even where such representation has been acted upon, I think there is nothing to prevent the party who made the representation from afterwards saying,—I was mistaken in the representation I made to you, and, so far as you

have not yet acted upon the faith of it, I retract it, and require you to act as if the representation had never been made. Taking, therefore, the letter of Ridgway & Blake to be within the rule in *Pickard v. Sears*, as qualified by *Freeman v. Cooke*, and to be binding upon the defendants so far as it had been acted upon by the plaintiff, I think it is quite clear that that rule cannot apply to the claim for rent in respect of which the representation had not been acted upon. Inasmuch, however, as the defendants are entitled to judgment in this action if any amount of rent was due at the time of the distress, it is unnecessary to decide whether or not the doctrine of *Pickard v. Sears* applies even partially to the present case.

BYLES, J.—I am of the same opinion. To gather the questions to be decided in this case from the immense mass of paper which is (perhaps not unnecessarily) laid before us would have been a task of extreme difficulty; and I cannot forbear to express the obligation I feel to the learned counsel on both sides for the very clear and succinct manner in which they have stated it in the course of their able arguments. Divested of its accessories, and simply stated, the case is in substance this,—The avowants are tenants in tail. They happen to be married women,—a circumstance which is not altogether immaterial. They are tenants in tail *under a settlement which *233] contains a power for the tenant for life to lease for lives. A lease was duly made in exercise of that power; and the plaintiff in this replevin is the party who represents the lessee under that lease for lives. Now, the first difficulty which presents itself in this case arises from a prior term of 1000 years created under the powers of the settlement, which term precedes any possessory interest that could be acquired under the lease for lives. The history of that term is now quite clear, and, as it seems to me, it is entirely removed out of the case. The term became vested in two trustees, one of whom happened to be the tenant for life: and I take it that the effect of that was to merge one moiety of the term in him, leaving the other moiety in the representatives of the other trustee, if discovered. Now, what were his rights? He had no right to turn the tenant for life out of possession, for he had as good a right to be in as himself. Then, what would have been his position had he chosen to distrain? It has long been settled, in the case of a rent-charge, if it be divided by the act of the parties, the law will apportion it, and each of the grantees might distrain for his portion. A difficulty arose in the case of a rent-service; but that was got rid of by the statute 4 Anne, c. 16, s. 9, which dispensed with attornment: and in *Rivis v. Watson*, 5 M. & W. 255,† it was held by the Court of Exchequer that in such a case the assignee of the owner of a portion of the rent-service was equally entitled to distrain for his undivided moiety as the owner of a moiety of a rent-charge would be. That being so, the defendants in this case had a right to distrain for one moiety of the rent, and the representatives of the other trustee of the term would have a right to distrain for the other moiety. It is quite unnecessary here to consider whether *234] there be any *person, whether by estoppel or otherwise, who could represent that other trustee, because, as there may be a distress for the one undivided moiety, and as the amount of the rent on the one hand and the value of the goods on the other has not been

found, so as to bring the case within the statute of Charles the Second, that is sufficient to entitle the defendants to a return, which is all the judgment they ask for. The term of 1000 years may therefore be dismissed from consideration, which puts the case in a much more simple aspect. It is the case of a tenant in tail, or a tenant in fee simple, making a lease for lives, and having a clear right to distrain, and whose attorney or agent,—I assume that there is no disability arising from the fact of the parties being married women,—goes to the tenant and says “A. B. is entitled to receive the rent; pay you him;” and the tenant accordingly pays the rent to A. B., or, what Mr. *Tomlinson* very properly admits to amount to the same thing, suffers a judgment in an action for the rent at the suit of A. B. That payment, or that which is equivalent to payment, enures as a satisfaction pro tanto; for, the rule in *Pickard v. Sears* is fairly applicable so far. But to say that the doctrine of *Pickard v. Sears* would displace the estate tail, or destroy it by estoppel or by any relation of the parties under the tenancy for life, would be giving that doctrine a most dangerous and fatal consequence, and one for which no authority has been or could be cited. As far, therefore, as regards the rent which had been paid to Dr. Connell, or for which Dr. Connell had recovered judgment, the title of the avowants is gone; but I am of opinion that nothing which has occurred has the effect of preventing them from distraining for the moiety of the rent accruing subsequently, as to which the representation made by Messrs. *Ridgway & Blake* has not been acted upon. In *addition to which, Mr. *Tomlinson* has presented to our consideration what did not [*235 occur to me, viz. that the lease was made under a power contained in the settlement, and therefore if the doctrine of *Pickard v. Sears* were to be applied to the extent contended for by the plaintiff, the rights of the settlor would be affected by a representation made by a person who was not his agent: and there is the further difficulty of the defendants here being married women, and therefore unable to appoint an attorney so as to be bound by his representations. That being so, I entertain no doubt whatever that the avowants are entitled to the judgment of the Court upon one ground if not upon several.

KEATING, J.—I am of the same opinion. It is only necessary, in order to dispose of this case, to decide the question raised by Mr. *Smith*, and upon which he entirely rested his argument, viz., whether, assuming the title of the avowants to be unimpeachable, they had not estopped themselves, by reason of the doctrine of *Pickard v. Sears*, from recovering this rent. I entirely agree with the rest of the Court,—although the very able and ingenious argument of Mr. *Smith* at one time raised considerable doubt in my mind,—that there is nothing in that point; because, assuming that the representation made by Messrs. *Ridgway & Blake* could bind the defendants in this case in any way so as to bring them within the rule in *Pickard v. Sears*, they being married women, still that representation could by no possible construction be held to extend beyond the state of things existing at the time at which the representation was made. The rule laid down in *Pickard v. Sears* is, that, where one by his words or conduct willfully causes another to believe the existence of a certain state of things,

*236] and induces him to *act on that belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time. I do not, however, wish to be understood as in any way intimating an opinion that that doctrine ought to be allowed to prevail against the avowants under the circumstances of this case. The question how far an estoppel of this sort could bind a married woman came under the consideration of the Court of Exchequer in a case of *Cannam v. Farmer*, 3 Exch. 698.† That was an action upon a promissory note; to which there was a plea of coverture: and the question was whether the defendant had precluded herself from alleging that defence by the fact of her having upon the face of the note described herself as a "widow." The Court, however, held that the defendant's incapacity to contract, by reason of her coverture, was not removed by her representation. That consideration becomes of the less importance here, because Mr. *Tomlinson* does not dispute that the estoppel, as it is called, ought to prevail to the extent of the rent which the tenant has paid or for which he has become liable upon the judgment. I would remark, in conclusion, that the County Court Judge has introduced into the statement of the case a fact which might have spared us a very long discussion, and which would seem to me to have precluded the plaintiff from raising this objection at all, viz., that the warrant of distress was signed by Dr. Connell. However, taking the points as they have been argued, and assuming the warrant not to have been signed by Dr. Connell, I agree with the rest of the Court in thinking that the avowants are entitled to judgment for a return, with costs.

Judgment accordingly.

For the American cases, see the note to *Duchess of Kingston's Case*, 2 Smith's L. C. pp. 642, 667.

*237] *GEORGE WILTSHIRE, Appellant; WILLIAM BAKER, Respondent. Nov. 18.

The 25th section of the "Llandaff and Canton District Markets Act, 1858," 21 & 22 Vict. c. cv., enacts that "every person who shall sell or expose for sale at any place within the limits of this Act (other than in any existing market-place, or the market-house and market-places to be established under this Act, or in his own dwelling-house, or in any shop attached to and being part of any dwelling-house) any article in respect of which tolls are by this Act authorized to be taken, other than eggs, butter, and fruit, shall forfeit 40s. :"—

Held, that a vessel moored to a wharf on the old canal within the limits was not a "shop" within the exemption.

THIS was a case stated pursuant to the statute 20 & 21 Vict. c. 43, for the opinion of the Court, by two of Her Majesty's justices of the peace for the borough of Cardiff, in the county of Glamorgan.

At a petty sessions held in and for the said borough on the 12th of July, 1861, the respondent appeared before the justices in obedience to a summons charging him with having on the 5th July then instant unlawfully exposed potatoes for sale at a certain place within the limits of "The Llandaff and Canton District Markets Act, 1858," 21

& 22 Vict. c. cv., to wit, in a vessel in the old canal, within the said borough of Cardiff.

Section 25 of the local act enacts that "every person who shall sell or expose for sale at any place within the limits of this Act (other than in any existing market-place, or the market-house and market-places to be established under this Act, or in his own dwelling-house, or in any shop attached to and being part of any dwelling-house) any article in respect of which tolls are by this Act authorized to be taken, other than eggs, butter, and fruit, shall forfeit and pay to the Company any sum not exceeding 40s."

The town of Cardiff, including a portion of the "Old Canals," is within the limits of the Act.

The evidence produced at the hearing was as follows:—

Thomas Gould said: "I was at the Old Canal on the morning of the 5th of July. I remember seeing *William Baker weighing up [*238 potatoes(a) on the wharf; and I purchased from him half a ton. They were taken out and weighed on the wharf; and I took them away. I paid at the rate of 9*l.* 10*s.* per ton."

Cross-examined: "I saw Mr. Wiltshire there. This is the place where they are regularly sold."

Re-examined: "The potatoes were purchased in the vessel, and were landed and weighed on the wharf."

This was the whole case in support of the summons. The justices were of opinion that the place of sale,—the vessel,—should in a liberal interpretation of the exemption clause above recited, be considered a dwelling-house or shop; and they accordingly dismissed the information.

The appellant being dissatisfied with the determination of the justices, as being erroneous in point of law, duly applied for a case for the opinion of this Court; in compliance with which application the justices stated the above case and prayed the opinion of the Court thereon.

The question for the consideration of the Court was, whether the sale or exposure for sale of an article subject to toll in a ship or vessel within the limits of the Act, is protected by the exemption clause above referred to.

Giffard, for the appellant.—The decision of the justices in this case was clearly wrong. There was no evidence before them to justify their conclusion that the ship in question was a dwelling-house, or a shop attached to a dwelling-house, so as to bring the case within the exemption contained in the section of the local Act set out in the case. [WILLIAMS, J.—If the *justices had found that the respondent and his family lived on board, the vessel might possibly have [*239 been considered for some purposes a dwelling-house: but nothing of the sort is suggested here. BYLES, J.—To hold that a ship may be a "shop" within the exemption in s. 25, will be substantially to destroy the toll; for, most of the imports into Cardiff must necessarily be by ships.] They are so.

No one appeared to support the magistrates' decision.

ERLE, C. J.—I am of opinion that this appeal should be allowed. I would presume most strongly in favour of the local knowledge of

(a) An article in respect of which a toll is payable under the Act.

the persons who drew this case. But, as the question referred to us is without any detail of particulars, but is a mere question whether a vessel moored to a wharf on the old canal within the limits of the town of Cardiff, nothing being found as to the way in which it is used, I am of opinion that we can do no otherwise than come to the conclusion that the justices have taken an erroneous view of the Act of Parliament.

The rest of the Court concurring,

Decision reversed.(a)

(a) See the next case.

*240] *GEORGE WILTSHIRE, Appellant; JOHN WILLETT, Respondent. Nov. 18.

The 25th section of the Llandaff and Canton District Markets Act, 1858 (21 & 22 Vict. c. cv.), enacts that every person who shall sell or expose for sale at any place within the limits of the Act (other than in *his own dwelling-house* or in any *shop* attached to and being part of any dwelling-house), any article in respect of which tolls are by this Act authorized to be taken, shall incur a penalty of 40s.

Held, that, to bring it within the exemption, the shop need not be attached to and part of the dwelling-house of the party himself.

Held also, that a sale *by auction* in a "shop" attached to and being part of any dwelling-house is privileged.

THIS was a case stated pursuant to statute 20 & 21 Vict. c. 43, for the opinion of this Court, by two of Her Majesty's justices of the peace for the borough of Cardiff, in the county of Glamorgan.

At a petty sessions held in and for the said borough on the 23d of August, 1861, the respondent appeared before the justices in obedience to a summons charging him with having on the 9th of August then instant, unlawfully exposed for sale forty sacks of flour, one sack of toppings, a quantity of hams, a quantity of beef and pork, and a quantity of cheese, in certain auction-rooms in High Street, in the said borough, and within the limits of the Llandaff and Canton District Markets Act, 1858.

Section 25 of the said Act enacts, that "every person who shall sell or expose for sale at any place within the limits of this Act (other than in any existing market-place or the market-house and market-places to be established under this Act, or in his own dwelling-house, or in any shop attached to and being part of any dwelling-house) any article in respect of which tolls are by this Act authorized to be taken, other than eggs, butter, and fruit, shall forfeit and pay to the Comptroller any sum not exceeding 40s."

The town of Cardiff is within the limits of the said Act. The sale by auction by the respondent of the articles and at the place and time mentioned in the summons was proved by James Holloway, who in cross-examination said: "Mr. Willett's auction-room is part of a house,—a regular house,—no one lives there now: it is a dwelling-house."

*241] *The respondent admitted that he only rented the shop, and no other part of the house.

The respondent called several witnesses: but the only one who gave evidence material to the grounds of the determination was his

clerk, Henry Jones, who, after making certain statements irrelevant to this case, said: "The premises which Mr. Willett occupies are part of No. 5, High Street, which is a dwelling-house with shop under it: the upper part is occupied by Mr. Evans, who has a communication with it: there is a communication down stairs, Mr. Willett occupies the shop." On cross-examination, he added: "I do not go to any other part of the house for business."

The justices were of opinion, upon these facts, that the sale took place in a shop attached to and being part of a dwelling, and so within the exemption contained in the section of the Company's Act above recited; and they accordingly dismissed the charge.

The question for the consideration of the Court is, whether the sale in question is within the exemption above referred to.

Giffard, for the appellant.(a)—In *The Llandaff and Canton District Market Company*, app., Lyndon, resp., 8 C. B. N. S. 515 (E. C. L. R. vol. 98), it was held that a sale by auction of horses by A., a licensed auctioneer, in a *yard* attached to the dwelling-house of B. within the district, was an offence within the Act of parliament now *in question. But that case is not quite conclusive of the present. [*242

The object of the exemption contained in the 25th section of the Act was the protection of the ordinary traders of the district against the Company's monopoly. To bring a shop within the exemption, it must be attached to and form part of a dwelling-house in the occupation of the person claiming the exemption. If it were otherwise, it would be competent to any one to set up a rival market on a small scale within the district. [ERLE, C. J.—The objects of the Act of parliament were, to get the highways cleared of obstruction, and to have all marketable commodities carried to the new market-place for sale. Are not these objects attained if the shop is in *any* dwelling-house? May not a man carry on a retail trade in a shop in and being part of a dwelling-house not his own, and have his own dwelling-place elsewhere?] It is submitted that he does not bring himself within the exemption unless the dwelling-house is attached to and part of his own dwelling-house. At all events, an auction-room is not a "shop" within the meaning of the statute. In the common and ordinary acceptation of the word, a shop is a room or building in which goods are sold by retail. Besides, the respondent is not the seller of the goods, but only the agent of the seller, and therefore he cannot be entitled to the benefit of the exemption. [ERLE, C. J.—Would not a man who sold goods on commission in a shop of his own be within the exemption?] Possibly he would: the goods might in a certain sense be said to be his goods. [WILLIAMS, J.—An auctioneer may maintain an action for goods sold and delivered.]

Waddy, for the respondent.—The words of the exemption are,— "other than in any existing market-place, or the market-house and market-places to be *established under this Act, or in *his own* [*243 dwelling-house, or in any shop attached to and being part of

(a) The point marked for argument on the part of the appellant was as follows:—

"That a sale by auction under the circumstances and in the place stated in the case is not protected by the exemptions from penalties created by the 25th section of the Llandaff and Canton District Markets Act, 1858 (21 & 22 Vict. c. cv.), which, it will be contended, applies to ordinary shopkeepers carrying on business as shopkeepers."

any dwelling-house." It is obvious from this variation in the language that the Act did not intend to limit the exemption to the party's own dwelling-house. And this construction is confirmed by the 13th section of the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), which is incorporated with the local Act, "except so far as the same shall be expressly varied thereby," and which enacts, "that, after the market-place is opened for public use, every person other than a licensed hawkers who shall sell or expose for sale in any place within the prescribed limits, *except in his own dwelling-house or shop*, any articles in respect of which tolls are by the special Act authorized to be taken in the market, shall for every such offence be liable to a penalty not exceeding 40s."

ERLE, C. J.—Without hearing any further argument, I am of opinion upon the first point that the magistrates were right in holding, that, to entitle the party to the exemption contained in the 25th section of the local Act, it is enough to show that the sale took place in a shop attached to and being part of a dwelling-house, whether the party who sells in the shop dwells in the dwelling-house to which it is attached or of which it forms part, or not. The 13th section of the general Act 10 & 11 Vict. c. 14 enacts that, "after the market-place is opened for public use, every person other than a licensed hawkers who shall sell or expose for sale in any place within the prescribed limits, *except in his own dwelling-house or shop*, any articles in respect of which tolls are by the special Act authorized to be taken in the market, shall for every such offence be liable to a penalty not exceeding 40s.:" and the 25th section of the local Act imposes a like *244] penalty on *every person who shall sell or expose for sale at any place within the limits of the Act any article in respect of which tolls are by that Act authorized to be taken, other than eggs, butter, and fruit, unless he so sells or exposes for sale "in any existing market-place, or the market-house and market-places to be established under that Act, or in *his own dwelling-house*, or in any shop attached to and being part of *any dwelling-house.*" It appears to me that this deviation from the language of the general Act shows that the larger exemption was intentionally introduced, and that the party incurs no penalty if he sells in a shop attached to and being part of *any dwelling house* within the district, whether it be his own dwelling-house or not. As to whether or not an auction-room is a "shop" the magistrates had all the evidence before them: and, though the facts stated are not sufficient to raise some of the points which have been alluded to, I see nothing to warrant them in coming to the conclusion that this was not a shop. I can see no reason why a man selling goods in a shop may not sell them by auction or on commission as agent for another; more especially as an auctioneer can maintain an action for the price of goods so sold by him. I am clearly of opinion that the decision of the magistrates was right.

WILLIAMS, J.—I am of the same opinion. The 25th section of the Llandaff and Canton District Markets Act, 1858, is to some extent declaratory of the common law. In the absence of a custom, the owner of a market could not at common law prevent the owners of shops in the town from selling marketable goods in their shops on market-days. It is said, that, to entitle a tradesman to the exemption

contained in the 25th section of the local Act, the shop in which the articles are sold or exposed for sale must be attached to and *part of *his own* dwelling-house. I think, for the reasons [*245 already pointed out by my Lord, that the language of the section does not warrant so limited a construction: the words are "or in any *shop* attached to and being part of *any* dwelling-house." (a) It is by no means an uncommon thing for a man to occupy a shop, the dwelling-house to which it is attached and of which it forms part being occupied for a residence by another person. I am clearly of opinion that the magistrates were justified, upon the evidence before them, in finding as they did.

BYLES, J.—I quite agree with my Lord and my Brother Williams in thinking that the conclusion of the magistrates in this case was right. The only part of Mr. *Giffard's* argument which at all pressed me was his criticism on the word "shop." But both the common law and the general Act for the regulation of markets and fairs, 10 & 11 Vict. c. 14, treat a shop as a privileged place. One of the witnesses calls the place in question here a shop: and, in the absence of evidence to the contrary, I cannot say that it was not a shop. If it was a shop, the mode of selling therein cannot deprive it of the ordinary privilege attached to a shop. My judgment is therefore founded mainly upon the fact that upon the evidence before the magistrates the place where the supposed offence was committed was a shop, and therefore within the exemption contained in the 25th section of the Llandaff and Canton District Markets Act, 1858.

KEATING, J., concurred.

Appeal dismissed, with costs.

(a) For the obvious purpose of excluding "shed or stall."

*WILLIAM HENRY COLBRAN, Surveyor to and on behalf
of THE BURNLEY IMPROVEMENT COMMISSION. [*246
ERS, Appellant; JAMES BARNES, Respondent. Nov. 18.

By the 158th section of the Burnley Improvement Act, 1854 (17 Vict. c. lxxvii.), it is enacted, that, if any person shall build, erect, or place any building, erection, or thing within fifteen feet of the centre of the bed of the stream of the Brun, he shall be summoned before justices, who may order the removal of the obstruction, and impose a penalty on the offender.

In 1857, a flood washed away the bed of the river, and, in 1859, the respondent, who had mills or works adjoining, and was owner of the land on both sides of the stream, restored the bed to its original level by laying large stones across, side by side, without any cement or other fastening:—

Held, that this was not a "building, erection, or thing," within the 158th section, and therefore that the justices were justified in declining to convict.

At a petty sessions held at Burnley, in and for the higher division of the hundred of Blackburn, in the county of Lancaster, on the 11th of February, 1861, before four of Her Majesty's justices of the peace in and for the said county, an information and complaint preferred by William Henry Colbran, the surveyor to and on behalf of the Burnley Improvement Commissioners (hereinafter called the appellant), against James Barnes (hereinafter called the respondent), under the 158th section of the 17 Vict. c. lxxvii., called "The Burnley Improvement Act, 1854," complaining that the said James Barnes, since the

passing of "The Burnley Improvement Act, 1854," to wit, on the 16th of June, 1854, at the township of Burnley, in the said county, did build, erect, and place a certain building, erection, and thing, to wit, a weir or caul, within fifteen feet of the centre of the bed of the stream of the Brun there, the same being within the limits of the said Burnley Improvement Act, was heard and determined by the justices, the said parties respectively being then present; and, upon such hearing, the justices dismissed the information and complaint, and refused to grant the order so applied for.

Upon the application of the appellant, the following case was stated for the opinion of the Court:—

Upon the hearing of the said information and complaint, the Queen's printer's copy of "The Burnley Improvement Act, 1854," was given *247] in evidence; and *proof was given by the appellant, and the fact was admitted by the respondent, that the locus in quo was within the limits prescribed by the Burnley Improvement Act, 1854: and it was further admitted by the respondent that the alleged building, erection, or thing so complained of was placed in the bed of the river Brun by him the said James Barnes, the respondent, since the passing of the said Act, namely, in or about Septembdr, 1859.

It was proved by the appellant that large stones of considerable size and weight had been, about the last-named period, placed by the respondent in the bed of the said river or stream, extending from one side of the said river or stream to the other. Such stones were not placed one upon another, nor cemented together either by lime or cement, or fastened together in any way, but only rested in the river by their own weight, side by side. Upon this state of facts, it was contended by the counsel who appeared on behalf of the appellant, that, according to the true construction of the Burnley Improvement Act, especially the 156th and 158th sections thereof, it was imperative on the justices, without going into any question of merits or damage, to grant an order under the 158th section, requiring the respondent to remove the alleged building, erection, or thing within a certain time, not exceeding one month from the date of the said order; and that they should also order the respondent to pay to the appellant his reasonable costs, to be ascertained and specified as directed by the 158th section of the said Burnley Improvement Act.

It was admitted by the appellant that the river at the point where the alleged building, erection, or thing so complained of was so placed, was and is now upwards of thirty feet wide, and that the said alleged *248] building, erection, or thing was so placed as aforesaid *about September, 1859; and that no damage is done to the drains or sewers emptying themselves into the said river above the said alleged building, erection, and thing.

It was contended by the attorney on the part of the respondent,—first, that the information and complaint ought to have been laid and made within six calendar months from the time when the matter of such complaint and information arose, that is to say, when the stones were so placed as aforesaid in the bed of the river, in accordance with the statute 11 & 12 Vict. c. 43, s. 11 (Jervis's Act), inasmuch as no time is limited by the Burnley Improvement Act, 1854, for making and laying such information and complaint: and, inasmuch as the

alleged building, erection, or thing was so placed about September, 1859, the respondent, by his attorney, contended that the information and complaint ought to have been laid and made within six calendar months from that date.

Secondly,—that the 158th section of the Burnley Improvement Act did not apply to any building, erection, or thing placed in the bed of the river extending from one side to the other; but that the said 158th section and the 159th section of the Burnley Improvement Act were intended only to prevent the owners of land on either side of the said river from encroaching from the sides thereof towards the centre of it, and contracting the said river to a less width than fifteen feet from each side of the river to its centre, or thirty feet in the whole.

Thirdly,—that the said stones so laid by the respondent in the bed of the river did not form a building, erection, or thing within the meaning of the said 158th section of the Burnley Improvement Act, inasmuch as the stones were not built, erected, or placed *one [249 upon another, but only laid down in the bed of the river, side by side.

Fourthly,—that the respondent had a right to so place the said stones, because the bed of the river belonged to him; that he was the owner of the land on each side of the river; and that he had a right to take the water to his mill and works which were erected there; that, when the works were erected in 1845, the bed of the river was two feet six inches higher than it now is; and that it so continued until August, 1857, when a great flood occurred, and tore up the bed of the river, lowering such bed at and near the place where the said stones are so placed to the extent of two feet six inches, thereby preventing the water flowing into the respondent's premises for the purposes of his works; and that all that the respondent had done was to replace the bed of the river so washed away, with heavy stones, instead of gravel, which would have been again washed away, in order that the water might run into the respondent's goit as before; and that the said stones were so placed as to be several inches below what had been the bed of the river up to August, 1857, the time of the flood.

It was then proved on behalf of the respondent, that the respondent's mill and works at the locus in quo were at considerable expense erected in 1845, at which period the bed of the river was very nearly level,—that he erected on the north side of the river a wall; that, in such wall he placed an iron grating for the water to run through into a goit and reservoir in respondent's adjoining land, for the purpose of admitting water to the mill; that the sill or bottom of such iron grating was nineteen inches below the then bed of the river, in order that the water might run from the river into the goit without any artificial means; and that the water did so run into the goit by simply *keeping the iron grating open, and for that purpose hollowing [250 out a little a small portion of the bed of the river close to such iron grating for the purpose of admitting water through it to the said goit; that, about the month of August, 1857, whilst the respondent was erecting a shed on the south side of the river, there was a great flood in the said river; that it carried away the soil of the bed of the said river to the depth of about eighteen inches, commencing at a

point about six feet higher up the stream than the said iron grating of the said goit (the said stones so complained of as aforesaid being below the said iron grating), and about three feet in depth at and immediately below the place where the said stones are placed; that, in consequence of the said carrying away of the said soil, the water sank considerably below the sill of the iron grating of the said goit, and that he, the respondent, was therefore unable to obtain water for his said mill, and that thereupon he caused a quantity of loose stones and gravel to be placed in the bed of the said river, so as to replace and fill up what had been washed away, in order that the water might again run into the goit as before; that, from the time of the said flood in August, 1857, to September, 1859, loose stones and gravel were from time to time placed in the bed of the river, to replace such as had been and were continually being washed away by floods, but such deposits of stones and gravel did not raise the bed of the river higher than it was at the time the mill was built; that, to save the trouble of having to go into the water continually to replace such loose stones and gravel, the present large ashlar stones were put in the bed of the river extending from one side to the other, but in such manner as that the highest surface of such ashlar stones is several inches below the surface of the bed of the river as it existed before and up to the *251] time *of the said flood; that the said ashlar stones are simply laid level, side by side, not the one upon another; that they are not fastened either with cramps, lime, cement, or any other thing; that they remain there by their own weight; that, if the said stones had not been so placed, the bed of the river would have got lower and lower, to the damage of the foundations of the respondent's works and buildings: and that there now is a considerable fall from the surface of the stones to the river below them, but that such stones did not and do not raise the bed of the river and the surface of the water, so as to interfere with the drainage of the town communicating with the river.

The appellant contended, in reply, that the evidence on the part of the respondent was sufficient in itself to prove the case of the appellant, and moreover that the effect of placing such a "thing" as aforesaid across the river must in the natural course of events prevent the scouring of the river, and be an interruption to the proper flow of the drainage and sewage of the town.

The magistrates were of opinion, as follows:—First, with regard to the first ground of contention on the part of the respondent, they were of opinion that the placing of the stones, if an offence at all, was a continuing one; and that the question could now be gone into by them, notwithstanding more than six months had elapsed since the said placing of the stones.

Secondly,—with regard to the second ground of contention on the part of the respondent, they were of opinion that the 158th section of the Burnley Improvement Act only applied to a building, erection, or thing built, erected, or placed so as to make the river of less width in the whole than thirty feet, or so as to make the river of less width than fifteen feet from each side of it to its centre, or so as to obstruct *252] the ancient *course of the stream by raising the bed above its original level.

Thirdly,—with regard to the third ground of contention on the part of the respondent, they were of opinion that, according to the facts proved, what had been so placed in the bed of the river was not a building, erection, or thing within the meaning of the 158th section, inasmuch as the said stones were not and are not placed one upon another, nor are fastened or cemented together, but simply lie in the bed of the river, side by side, by their own weight.

Fourthly,—with regard to the fourth ground of contention on the part of the respondent, they were of opinion that he had, under the facts and circumstances proved, a right to replace the bed of the river so proved to have been washed away, and to place the said stones in the then bed of the river in the manner and for the purposes he had done, inasmuch as he was the owner of the bed of the river, and the owner of land and buildings on each side of it, and inasmuch as the highest part of the surface of such stones is several inches below the bed of the river as it existed prior to 1845, and down to August, 1857.

Fifthly,—with regard to the contention of the counsel for the appellant that it was imperative upon the magistrates to grant an order under the 158th section, requiring the respondent to remove the alleged building, erection, or thing, without going into any question of merits or damage, they were of opinion that they ought to hear all the facts and circumstances of the case, and to allow the respondent to show cause why such alleged building, erection, or thing should not be removed, and that it was not imperative upon them to grant an order without going into the facts and circumstances of the case; and they were of opinion that they were justified in refusing the application for an order, inasmuch as they were satisfied from [*253 the said several grounds of contention on the part of the respondent that the alleged building, erection, or thing had not been built contrary to the said 158th section.

And, upon all the facts and circumstances proved, and upon the merits of the case, and for the several reasons above stated, the magistrates were unanimous in refusing the application for an order to remove the alleged building, erection, or thing.

The questions of law arising upon the above statement for the opinion of the Court are those involved in the first, second, third, fourth, and fifth points lastly mentioned, and upon which the magistrates formed their opinions as stated.

Whereupon the opinion of the Court of Common Pleas is asked, whether or not the justices were correct in their determination as firstly, secondly, thirdly, fourthly, and fifthly thereinbefore set out, and as to what further should be done or ordered in the premises.

Manisty, Q. C. (with whom was *Dwyer*), for the appellant.(a)—The questions raised for the consideration of the Court upon this appeal turn mainly upon the construction of the 156th, 158th, and 159th sections of the Burnley Improvement Act, 1854 (17 Vict. c. lxvii).(a)

(a) The points marked for argument on the part of the appellant were as follows:—

“That the placing of large stones by the respondent in and across the river Brun in the manner stated in the case, was contrary to the provisions of the 158th section of the Burnley Improvement Act, 1854 (17 Vict. c. lxvii.); and that the justices ought to have granted an order requiring the respondent to remove them.”

*254] The 156th section enacts "that the *Commissioners may cleanse and scour, as they think fit, the waterways or beds and courses within the town of the Brun and the Calder." The 158th section,—on which the information is laid,—enacts, "that, if any building, erection, or thing shall have been built, erected, or placed within fifteen feet of the centre of the bed of either of the streams of the Brun or the Calder since the 1st of January, 1854, or if any person, by himself or others, at any time hereafter, build, erect, or place any building, erection, or thing within such fifteen feet, the Commissioners shall summon such person to appear before two justices, to show cause why such building, erection, or thing should not be removed; and if the person so summoned fail to appear according to the summons, or fail to show to the satisfaction of the justices that such building, erection, or thing is or has not been built contrary to this enactment, the justices by writing under their hands shall order such person to remove the same within a time specified in the order, not exceeding one month after the date thereof, and shall also order such person to pay to the Commissioners their reasonable costs therein incurred, such costs to be ascertained by two justices, and the amount thereof to be specified in such order; and if such person fail to obey and fully carry out such order, every such person so failing shall forfeit not exceeding 10*l.*, and 40*s.* additional for every day during which such default continues; and the Commissioners may, if they think fit, and without prejudice to the liability of such person to such penalties, do the work required by the order, and recover the expenses as damages." And the 159th section enacts "that nothing in this Act contained shall prevent the owners of the lands adjoining the said streams from arching over the same; provided always that the span *255] of each such arch shall not be of a less width than *thirty feet." The question is whether a person who has placed stones in the bed of the river in the manner set forth in the case, from side to side, can be said not to have built, erected, or placed a building, erection, or thing therein, within the meaning of the 158th section. It appears, that, in 1857, a violent flood occurred, which scoured the river and took away a considerable portion of the bed of the stream. That state of things continued down to the year 1859, when the defendant did the act complained of. The stones so placed, no doubt, are still some inches below what was the level of the bed of the river as it was before the flood in 1857. But it is submitted that it is no answer for the respondent to say that the bed of the river was at a former time higher than at the time of the committing of the illegal act complained of. [BYLES, J.—The saving clause, s. 196, is not immaterial. That enacts, that "nothing in this Act contained shall in anywise diminish, alter, or prejudicially affect the rights and interests of the owners of the lands adjoining the river Brun within the said town."] The 156th section enables the Commissioners to cleanse and scour the stream. They clearly might, therefore, remove the obstruction placed by the respondent in the bed of the river. The first point urged before the magistrates on the part of the respondent, was, that the information and complaint ought to have been laid within six calendar months from the time of the placing of the building, erection, or thing in the bed of the river. But the offence with

which the respondent is charged is clearly a continuing offence: see *Whitehouse v. Fellowes*, 10 C. B. N. S. 765 (E. C. L. R. vol. 100). [BYLES, J.—If the Court should be against you upon the construction of the 158th section of the Act, all the other matters become immaterial.] That is so.

* *Welsby*, for the respondent(a) was stopped by the Court.

ERLE, C. J.—I am of opinion that the justices in this case [256 came to a right conclusion. The information was laid under the 158th section of the Burnley Improvement Act, 1854, 17 Vict. c. lxvii., which enacts, that, “if any *building, erection, or thing* shall have been *built, erected, or placed* within fifteen feet of the centre of the bed of the river Brun since the 1st of January, 1854, or if any person, by himself or others, at any time hereafter, build, erect, or place any building, erection, or thing within such fifteen feet, the Commissioners shall summon such person to appear before *two justices, to show cause why such building, erection, or thing should not [257 be removed,” &c. The respondent is shown to have placed certain ashlar stones from side to side across the bed of the river, but not so as to raise it beyond the original level of the river's bed. The justices were of opinion, that, according to the facts proved, what had been so placed in the bed of the river was not a building, erection, or thing within the meaning of the 158th section, inasmuch as the said stones were not placed one upon another, nor fastened or cemented together, but simply lay in the bed of the river, side by side, by their own weight,—taking into account that the respondent was the owner of the land on both sides of the stream, and had mills and works adjusted to the ordinary level of the bed of the river in 1854, when the Act of parliament in question passed. There is nothing to show that any alteration took place until the time of the flood in 1857 which considerably deepened the bed of the river. The respondent in 1859 placed the ashlar stones across the bottom, doing no more than to make a partial restoration of the bed of the river which the flood of 1857 had washed away. Are these stones so placed a building, erection, or thing within the meaning of the 158th section? It appears to me, that, although the words are capable of that construction, it would be entirely contrary to the whole purview and intention of the legislature so to hold. The 157th section is framed for the purpose of enabling the Commissioners to keep the water of the river Brun pure

(a) The points marked for argument on the part of the respondent were as follows:—

“1. That the information and complaint ought to have been laid within six months from the time when the ‘erection, building, or thing’ in question was ‘built, erected, and placed’ in the river, viz. in September, 1859:

“2. That the 158th section of the Burnley Improvement Act, 1854, does not apply to a ‘building erection, or thing,’ erected or placed across the bed of the river from the one side to the other side thereof, as in this case:

“3. That what was so placed in the river by the respondent, as stated in the case, was not, nor is a ‘building, erection, or thing,’ within the meaning of the said 158th section:

“4. That, under the facts and circumstances proved before the justices, as stated in the case, the respondent acted lawfully and rightfully in placing the stones in the bed of the river, as proved to have been done by him in September, 1859; and that the doing so, or continuing the same so placed, constituted no offence against the said 158th section:

“5. That the justices were right in hearing all the facts and circumstances of the case; that it was not imperative on them to grant an order for the removal of the alleged ‘building, erection, or thing,’ as contended on behalf of the appellant; and that they were right in refusing to grant such order.”

and free from pollution: and the object of the 158th was to keep the river free from obstruction. And, though by the 156th section the Commissioners were empowered to cleanse and scour, they were not to deepen the bed of the stream so as to affect the rights of the riparian *258] proprietors. It seems to me *that the placing of these stones for the mere purpose of restoring the bed of the river to its former level, and to make it more permanent, without at all affecting the rights of any other of the adjoining owners, was no violation of the 158th section. I therefore think the justices put a correct construction upon the intention of the legislature to be gathered from the language of the 158th section, coupled with the state of things at the time of the passing of the statute.

The rest of the Court concurring,

Judgment for the respondent.

WRIGHT and Another v. DANIEL LEONARD and ELIZABETH, his Wife. *July 8.*

In an action for the false and fraudulent representation of a married woman, that certain acceptances were the acceptances of her husband, whereby the plaintiffs were induced to discount them, and sustained loss through their turning out to be forgeries:—

Held, by Williams, J., and Willes, J., that the husband was properly joined as a defendant:

Held, by Erle, C. J., and Byles, J., that he was not,—the false representation being in substance a warranty of a debt, and so in the nature of a contract.

THIS was an action for a false representation by the female defendant.

The declaration, after stating that one James Jones Salt was possessed of certain bills of exchange therein described, and being three in number, and respectively drawn by the said James Jones Salt, and directed to the defendant Daniel Leonard, averred that the said bills of exchange purported to be accepted by the said Daniel Leonard, and that the said James Jones Salt, being possessed of the said bills so purporting to be accepted as aforesaid, and before they respectively became due and payable, applied to the plaintiffs to discount the said *259] bills for him the said James Jones *Salt; and, further, that the said Elizabeth, being desirous that the plaintiffs should discount the said bills as aforesaid, and wrongfully and injuriously intending to deceive and defraud the plaintiffs in that behalf, then falsely, fraudulently, and deceitfully represented and asserted to the plaintiffs that the said bills of exchange so purporting to be accepted by the said Daniel Leonard as aforesaid were in truth and in fact accepted by him, and that he was liable thereon; and that thereupon the plaintiffs, confiding in the said representation and assertion of the said Elizabeth, then discounted the said bills, and advanced to the said James Jones Salt the sum of 500*l.* for the same; and the said James Jones Salt then endorsed and delivered the said bills purporting to be so accepted as aforesaid to the plaintiffs; whereas, in truth and in fact, the said bills were not accepted by the said Daniel Leonard or by any person with his authority or consent, and the said Daniel Leonard was not liable on the same, and had refused to acknowledge

or pay the same, or to be bound thereby; and the said bills became due and payable before the commencement of this action: Averment that the plaintiffs had done and performed all conditions precedent, and that all necessary times had elapsed to entitle them to maintain the action.

Fourth plea, that the said Elizabeth, at the time of making the alleged representation and assertion, was the wife of the defendant Daniel.

To this plea the plaintiffs demurred, the grounds of demurrer stated in the margin being, "that a married woman who makes a false and fraudulent representation as in the declaration mentioned, is liable in damages for the same: also that the plea neither traverses the declaration nor confesses and avoids it, but merely reiterates what is averred in the declaration." Joinder.

**J. H. Hodgson*, in support of the demurrer.(a)—The plea is [*260 bad: it neither traverses nor confesses and avoids any material allegation in the declaration. [ERLE, C. J.—The real question will be whether the declaration discloses a cause of action.] Although a married woman is not liable on a contract made by her during coverture, she clearly is liable for a tort committed by her: *The Liverpool Adelphi Loan Association v. Fairhurst and Wife*, 9 Exch. 422.† In that case the wife was held not to be liable, because "the fraud was directly connected with the contract with the wife, and was the means of effecting it, and parcel of the same transaction." Here, there was no contract with the wife, but a mere fraudulent statement of that which was not true. The fraud is the foundation of the action. In *Foster v. Charles*, 6 Bingh. 396, 402 (E. C. L. R. vol. 19), 4 M. & P. 61, which was an action for a false representation as to the character of an agent about to be employed by the plaintiff, Tindal, C. J., says: "It has been urged that it is not sufficient to show that a representation on which a plaintiff has acted was false within the knowledge of the defendant, and that damage has ensued to the plaintiff, but that the plaintiff must also show the motive which actuated the defendant. I am not aware of any authority for such a position, nor that it can be material what the motive was. The law will infer an improper motive, if what the defendant says is false within his own knowledge, and is the occasion of damage to the plaintiff." It is *clear, [*261 therefore, that, in order to sustain this declaration, the plaintiffs must prove fraud.

Gray, contra.(b)—There is no authority to show that husband and wife can be made liable on such a representation as this, which it was

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That the plea neither traverses the declaration nor confesses and avoids it:

"2. That the defendants are responsible in respect of the false representation of the female defendant disclosed in the declaration, though the same were made by her during her coverture."

(b) The points marked for argument on the part of the defendants were as follows:—

"1. That the declaration in substance alleges a warranty or contract by a married woman, and she is not liable thereon, notwithstanding such warranty was made fraudulently:

"2. That a married woman is not liable on such a representation or assertion as set out in the declaration:

"3. That it does not appear that the female defendant knew that the representation or assertion was false:

"4. That it does not appear that it was entirely false, nor that a material part of it was false."

at the option of the plaintiffs to act upon or not. In *The Liverpool Adelphi Loan Association v. Fairhurst*, it happened that the alleged representation was connected with the contract made by the wife: but the case is rather an authority in favour of the defendants. In the course of the argument there, Alderson, B., says: "It seems to me that the torts of the wife for which the husband is to be considered as responsible are those only which are purely torts, that is to say, such as are in no way connected with a contract." And the argument of Mr. Hill in reply puts it quite independently of the contract being that of the wife. "The true rule," he says, "appears to be that which has been suggested by the Court, namely, that, where the husband is liable for the torts of his wife, the tort upon which such liability is founded must be a tort simpliciter, and not one which is either founded upon or connected with a contract. Where the wife makes a representation which is in fact false, and fraudulently made to her knowledge, to a third party, who by *giving credence to it is thereby *262] induced to enter into a contract, the husband is not liable for that tort, but the party who believes a representation so made must bear the consequences of his own credulity." The husband is liable for a trespass committed by his wife, or for slander uttered by her, but not for her representations. In *Cooper v. Witham*, 1 Levinz 247, 1 Sid. 375, 2 Keble 399, in case against the husband and wife, for that she, being covert, affirmed herself to be sole, and requested the plaintiff to marry her, laying it to be done maliciously, with intent to deceive him, whereupon he married her, &c.,—after verdict for the plaintiff on not guilty, it was moved in arrest of judgment that the action does not lie, for the wife cannot by any contract or agreement charge the husband, and, if he should be charged here, it would be by the wife's contract with the plaintiff to marry him; but for trespass or words she might charge the husband, for that she might do without assent of the husband or any other, and, if damage ensue thereupon, it ought to be recompensed by somebody, and no other can do that but the husband; but this marriage could not be made without the assent and contract of the plaintiff himself, and therefore it shall not charge the husband: and so held the Court, and gave judgment for the defendant. The Court of Exchequer, in *The Liverpool Adelphi Loan Association v. Fairhurst*, put the case of an infant upon the same footing as that of a wife: and in *Johnson v. Pie (or Pye)*, 1 Levinz 169, 1 Sid. 258, 1 Keble 905, 913, an infant was held not liable for a fraudulent representation that he was of full age, whereby the plaintiff was induced to contract with him. This case is referred to in Bacon's Abridgment, *Baron and Feme* (G). In Bacon, *Infancy and Age* (H), pl. 10, it is said that "neither an infant nor feme covert can *263] be guilty of a forcible entry or disseisin by barely *commanding one or by assenting to one to their use, because every such command or assent by persons under these incapacities is void; but an actual entry by an infant into another's freehold gains the possession, and makes him disseisor as well as it does a feme covert." Again, pl. 16,—"*Infants are liable for torts and injuries of a private nature; but, if an infant, affirming himself to be of age, borrows 100*l*. and gives his bond for it, and, being sued upon the bond, avoids it by reason of his nonage, yet no action lies against him for the deceit; for,*

though infants shall be bound by actual torts, as trespass, &c., which are *vi et armis*, yet they shall not for those that sound in deceit; for if they should, all the infants in England might be ruined." No case has been or can be cited where a married woman has been held liable for a mere representation. The same reasons which prevent a husband from being liable for the contracts of the wife during coverture, should equally prevent his being held responsible for a false representation made by her. [WILLES, J.—In *Ex parte The Unity Joint Stock Mutual Banking Association, In re King*, 3 *De Gex & Jones* 63, where an infant had obtained a loan on a representation, which he knew to be false, that he was of age, it was held by the Lords Justices that a proof for the loan was properly admitted in bankruptcy.] There can be no doubt as to the equity: here, the question is one of legal liability. *Johnson v. Pye* has been frequently recognised, and indeed was cited in the case last referred to.

Hodgson, in reply.—All the authorities cited tend to confirm the judgment of the Court of Exchequer in *The Liverpool Adelphi Loan Association v. Fairhurst*. No sensible distinction can be pointed out between the case of a false representation by the wife and [*264] *slander. [WILLES, J.—The husband would not be liable for the price of a diamond necklace bought by the wife unsuited to her husband's degree: but he would be liable in trover for the taking it away.] In *Catterall v. Kenyon and Wife*, 3 *Q. B.* 310 (*E. C. L. R.* vol. 43), 2 *Gale & D.* 545, bailiffs charged to execute process against the goods of J. S., wrongfully took the plaintiff's cattle in execution, and lodged them in the stable of an inn kept by the defendant K. The plaintiff demanded them of the defendant's wife, he being absent: the wife said she would consider, and make inquiry; and, on a subsequent demand, told the plaintiff that she was indemnified by the attorney who had issued the process, and that the plaintiff need not apply again. The cattle were detained, and sold under the execution, K. continuing absent during the whole transaction. In trover *against K. and his wife*, it was held that the above facts were evidence on which a jury might find a conversion by the wife, for which trover lay against both defendants. *Cur. adv. vult.*

The Court being equally divided in opinion, the Judges proceeded to deliver their judgments *seriatim*, as follows:—

BYLES, J.—I am of opinion that our judgment should be for the defendants.

The record shows that the female defendant, a married woman, fraudulently represented to the plaintiffs that certain acceptances were the acceptances of her husband, and thus the plaintiff, relying on those representations, was thereby induced to advance money on the bills to one Salt, the drawer.

The law is settled, that a married woman is liable with her husband for her torts, but that, on the other *hand, she is not liable on her contracts made during coverture. The law is the same as [*265] to infants: they are liable for their torts, but not (with certain exceptions) on their contracts. There is a class of intermediate cases, partaking partly of the nature of contracts and partly of the nature of torts, in which the question arises to which category they are to be referred.

It is not easy to lay down any general rule on the subject: but I conceive that, at all events, misrepresentations on the faith of which the plaintiff has acted, and which might have been treated by him as contracts or warranties, are not binding on the feme covert or the infant; for, if they were binding, then the protection which the law throws over married women and infants would be in great measure withdrawn. Thus, a misrepresentation by an infant that he is of full age (*Johnson v. Pye*, 1 Levinz 169, 1 Sid. 258, 1 Keble 905, 913), or a false statement by a married woman that she is discovert (*Cooper v. Witham*, 1 Levinz 247, 1 Sid. 375, 2 Keble 390, *Cannam v. Farmer*, 3 Exch. 698†), are no ground of action.

In America, there have been a great number of decisions to the effect that an infant is not liable for fraud, in cases where a contract is in substance the ground of action, or where it is contained in a contract which he is not capable of making: see *Wilt v. Welsh*, 6 Watts 9, *Brown v. Durham*, 1 Root 273, *Wallace v. Morse*, 5 Hill 391, *Morrill v. Aden*, 19 Vermont 505.

And it should seem that the law is the same in cases where there may be other objections to the validity of the contract besides the disability of the infant or married woman; such, for example, as the absence of consideration: for, otherwise, an infant or a married woman might be liable where they have received no consideration, and not liable where they have received consideration.

*266] The cases in which a married woman is liable for defamatory words are obviously distinguishable from cases in which she is sought to be made liable in an action ex contractu or ex quasi contractu. In the case of defamatory words, there is not only no contract or semblance of a contract on the part of the married woman herself, but there is no agreement or assent express or implied on the part of the plaintiff. This distinction is indicated somewhat obscurely in the case of *Cooper v. Witham* as reported in Levinz.

In the present case, the representation on which it is sought to charge the husband and wife seems to me to be in the nature of a warranty. But, for the reasons above given, it does not appear to me necessary to decide whether on such a warranty as is described in the declaration, an action might be brought, independently of the objection of coverture.

WILLES, J., delivered the joint judgment of Williams, J., and himself:—

In this case husband and wife are sued for a false and fraudulent representation by the wife to the plaintiffs that the acceptance on bills of exchange offered to them for discount by one Salt was of the handwriting of the husband, whereby the plaintiffs were induced to advance money to Salt by way of discount of the bills, which was lost by reason of the acceptances being forgeries.

The question is, whether these facts constitute a cause of action against the husband and wife. We are of opinion that they do. As a general rule, a married woman is answerable for her wrongful acts, including frauds, and she may be sued in respect of such acts jointly with her husband, or separately if she survives him. The liability is hers, though, living with the husband, it must be enforced in an action against her and him, which, to charge him, must be brought to

a *conclusion during their joint lives. Inasmuch, however, as she is not liable upon her contracts, the common law, in order [*267 effectually to prevent her being indirectly made so liable under colour of a wrong, exempts her from liability even for fraud, where it is "directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction." Such was the decision of the Court of Exchequer in *The Liverpool Adelphi Loan Association v. Fairhurst*, 9 Exch. 422, 429.† This is the extreme length to which the exemption has been carried in any decided case; and we do not consider ourselves entitled, upon grounds of supposed policy only, to infringe further upon the general rule of law.

We ought also to add that this exception, in favour of fraud accompanying a contract, does not, so far as we have been able to discover, exist in the civil law, nor in the law administered in the Court of Chancery, nor in that of Scotland,—which may be thought to show that it is not founded in any general principle, and therefore not to be enlarged. For the civil law as to minors, see 3 Savigny's Roman Law, cap. III., § cviii., p. 33 of French edition; Mackeldey, translation of 1st part, 222. For the Scotch law as to infants, see 1 Bell's Com. 18. For the law of Chancery as to infants, see *Stikeman v. Dawson*, 1 De Gex & Sm. 90; *Ex parte Unity Bank Association*, 3 De Gex & Jones 63. For the Scotch law as to married women, see 1 Bell's Com. by Shaw, 6th edit. 679: for the doctrine in Chancery, see *Vaughan v. Vanderstegen*, 3 Drewry 165, 369, 27 Law J., Ch. 793.

The present case falls within that general rule, there having been, if the declaration truly states the facts, no contract with the wife. In the event of her evidence showing a contract in the course of entering into which the alleged misrepresentation was made, *the ques- [*268 tion will then arise upon the facts, under the general issue, whether such a fraud is shown as falls within the rule or the exception. For the present, seeing that liability for a naked fraud, not accompanying a contract, is in question, we think there should be judgment for the plaintiffs.

ERLE, C. J.—Upon this demurrer the question is raised whether a husband is answerable for the alleged false representation made by his wife: and I am of opinion that he is not. The law makes him answerable for wrongs done by his wife to the property, person, or character of another, but not answerable for contracts made by his wife. It seems to me that a false representation by which credit is obtained is in its nature more fit to be classed with contracts than with wrongs. It is in substance a warranty of a debt, and so a contract. The liability is created by the words of the wife, amounting to a contract or guarantee, to which are to be added an intention on her part to deceive and a deception effected on the plaintiff. But, in substance, she becomes a guarantor for a third party, and makes a contract for which in the form of contract the husband is not answerable.

The nearest authority on the point is in favour of the defendant; for, in the *Liverpool Adelphi Loan Association v. Fairhurst*, 9 Exch. 422,† it was held that the husband is not answerable for a false representation made by his wife in connection with a contract made by her. It is there decided that he is to be exempt from responsibility for the false representation so made. I see no reason for holding that the

exemption should be limited to the particular case there in question. I see no reason why the addition of a breach of contract to a false representation should create the exemption.

*269] One reason assigned in argument for the exemption ^{was}, that the damage arises from the credulity of the plaintiff, who chooses to trust the wife: but that reason would exempt the husband in respect of all false representations made by the wife.

I would further observe that liability for false representations which are unconnected with contract was first affirmed in *Pasley v. Freeman*, 3 T. R. 51. The motive for the judgment of the majority of the judges in that case, is, the desire to suppress fraud: but by that desire they created an undefined liability, of which parties have availed themselves for fraudulent purposes; so that the effect of the decision has been the reverse of that which was intended. If this view is correct, there is good reason for not carrying the principle beyond the cases to which it has been adjudged to apply: and it has not been adjudged to apply to the false representation made by a wife.

For these reasons, together with the reasons and authorities adduced by my Brother Byles, I think our judgment should be for the defendant.

Judgment for the plaintiffs.

The plaintiffs being desirous of taking the opinion of a Court of error, Williams, J., withdrew his opinion, and consequently the judgment was entered pro forma for the defendant.

Judgment accordingly.

It is said by Chitty (1 Chitty on Pl. 76), that "a plaintiff cannot in general, by changing his *form* of action, charge an infant for a breach of contract; as for the negligent or immoderate use of a horse, &c., nor can he be a trespasser by prior or subsequent assent, but only by his own act. A married woman is liable for torts actually committed by her, though she cannot be a trespasser by prior or subsequent assent." The American cases bearing upon the liability of infants are collected and discussed in the note to *Tucker v. Moreland*, and *Vasse v. Smith*, 1 Am. L. C. 261, *et seq.*, (4th ed.) In *Keen v. Coleman*, 39 Pa. St. Rep. (3 Wr.) 299, a married woman had represented herself as a widow and thereby induced the plaintiff to take her bond, and obtained the consideration for which it was given; but it was held that while she might be liable to an action for the deceit practised by her (as to which, *quære*),

there could be no estoppel involved in the very act to which the incapacity related that could take away that incapacity. A distinction, however, has been taken where a married woman has given a bond or confessed a judgment for the purchase-money of land conveyed to her, and the obligation has been treated as a valid lien upon the premises, though invalid as against her personally: *Ramborger's Adm. v. Ingraham*, 2 Wr. 46; *Patterson v. Robinson*, 3 Am. Law Reg. 240.

And this rule has been applied in the District Court of Philadelphia to the purchase of personal property: *Schomaker v. Hayward*, 1864, MS. So in New York, a husband bought lumber for the building of a house, representing that it was his, when in fact it was his wife's, and thus obtained credit to himself. The house having been built with the knowledge and approval of the wife, it was *held* that these facts created an equitable lien in

favour of the seller upon the real property: *Mattice v. Lillie*, 24 How. Pr. 264; see also 18 N. Y. 280; 22 Id. 450; 22 Barb. 371, 385. And so in *Pilcher v. Smith*, 2 Head (Tenn.) 208, it was ruled that a purchaser of real estate from a married woman, whose covenant to convey was void, was entitled to either a specific execution or to a rescission of the contract, and if the *feme covert* resist the former, and the consideration-money has been paid, it will be decreed to be a lien upon the land.

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*PHILPOTT v. SWANN. July 8. [*270

Freight under a charter was insured, for a voyage from the Cape of Good Hope to Hondeklip Bay, an open roadstead 180 miles up the coast, there to load a cargo of copper ore, to proceed therewith to Swansea at a freight of 40*s.* per ton. Arrived at Hondeklip Bay, the master received on board part of the cargo (the whole being ready), when, a storm coming on, he was compelled to put to sea with the loss of an anchor and an injury to his windlass; and, after beating about the offing, he deemed it expedient to sail for St. Helena, a distance of about 1800 miles. Finding, on his arrival there, that he could not get an additional anchor or the requisite repair, the master discharged the portion of the outward cargo which he had not landed at Hondeklip Bay, and proceeded to Swansea with the homeward cargo, short by about 120 tons of a full cargo. The jury,—although the master did not run for the Cape, where it appeared that the necessary repairs might have been obtained,—found that the master acted throughout as a prudent owner uninsured would have done:—

Held, that, under these circumstances, the underwriters were not responsible as for a total loss of the freight of the 120 tons by perils of the sea.

THIS was an action on a policy of insurance dated the 17th of July, 1860, on charter-freight, on the ship *Greenwich*, valued at 500*l.*, from Table Bay to Hondeklip Bay, there to load a cargo of copper ore, and proceed therewith to Swansea.

The declaration averred that the plaintiff, being owner of the brig *Greenwich*, had effected a charter-party with Messrs. Philipps & King, that the ship, being then at Table Bay, should proceed to Hondeklip Bay, and there load a cargo of copper ore, and proceed therewith to Swansea, and there deliver the same on being paid freight 40*s.* per ton; that the ship arrived at Hondeklip Bay, and loaded a portion of the cargo, but was by perils insured against driven away from Hondeklip Bay without loading the residue, and prevented from returning thereto and completing the loading of the cargo, and was compelled to proceed to Swansea without such residue: Averment, that the loss on freight was 45*l.* 13*s.* per cent. There was also a claim for average loss; and the common counts.

Pleas to the alleged loss of freight,—first, that the ship was not prevented from returning to Hondeklip Bay and completing the loading of her cargo,—secondly, that the loss did not happen from perils insured against,—thirdly, that the ship was prevented from returning, by the wrongful acts, negligence, and default of the plaintiff,—fourthly as to the general average *loss, tender of 3*s.* 6*d.*,—fifthly, to [*271 the common counts, never indebted.

The plaintiff took issue on the first, second, third, and fifth pleas, and denied the tender alleged in the fourth plea.

The cause was tried before Erle, C. J., at the sittings in London after last Hilary Term, when the following facts appeared in evi-

dence:—The plaintiff was the owner of the brig *Greenwich*. The defendant was an underwriter at Lloyd's, and an insurer of 50*l.* on the policy. The vessel at the time of the making of the policy was lying in Table Bay, Cape of Good Hope, and was chartered by Messrs. Philipps & King to carry a cargo of general merchandise to Hondeklip Bay, which is about one hundred and eighty miles up the coast, to take thence a cargo of copper ore to Swansea, at 40*s.* per ton. The *Greenwich* was of 260 tons burthen, and had taken on board about 140 tons of ore (the remaining 120 tons being ready for shipment), and was ready to receive the rest, when a storm from the northwest arose, which rendered it necessary for the master to slip his anchor and put to sea, Hondeklip Bay being an open roadstead. After standing off and on for about twenty-eight hours, the master, finding that he could not safely remain on the coast in consequence of the damaged state of his windlass, and his having but one anchor left, instead of returning to the Cape,—where, it appeared, he might have got his capstan repaired,—proceeded to St. Helena, a distance of about eighteen hundred miles; and, ultimately, finding no facilities there for the necessary repair, and being unable to return to Hondeklip Bay without it, he resolved to unload the rest of his outward cargo (about 40 tons) there, and to proceed to Swansea with the cargo of copper ore then on board, where he arrived in due course.

*272] On the part of the plaintiff it was insisted that the *ship having been prevented by stress of weather from completing the loading of her homeward cargo, the owner was entitled to recover as for a constructive total loss of the freight of that portion which had been necessarily left behind. .

For the defendant it was contended that the master was not justified in proceeding to St. Helena for the purpose of effecting repairs which might have been effected so much nearer; and it was suggested that he had another motive for doing so, in proof of which reliance was placed upon an entry in the log-book, "sailed this day for St. Helena and England:" and it was insisted that he was bound at all events and at any cost to go back to Hondeklip Bay and take the remainder of his cargo.

In answer to a question put to them by His Lordship, the jury found that the master acted throughout as a prudent owner uninsured would have done. A verdict was thereupon entered for the plaintiff.

Bovill, Q. C., in Easter Term last, pursuant to leave reserved, obtained a rule nisi to enter a verdict for the defendant.—He submitted that there was no loss of freight by reason of a peril insured against,—citing *Everth v. Smith*, 2 M. & Selw. 278, *Mordy v. Jones*, 4 B. & C. 394 (E. C. L. R. vol. 10), 6 D. & R. 479 (E. C. L. R. vol. 16), *Brocklebank v. Sugrue*, 1 M. & Rob. 102, and *Moss v. Smith*, 9 C. B. 94 (E. C. L. R. vol. 67). He also moved, in the alternative, for a new trial on the ground that the verdict was against the evidence: but the Court said, that, as there was a fair balance of evidence on the one side and on the other, and as the Lord Chief Justice was not prepared to say that he was dissatisfied with the result the jury came to, the rule on that ground must be refused.

*273] *Lush*, Q. C., and *Honyman*, in Trinity Term, showed *cause.—After the finding of the jury, it must be assumed that the

course which the master adopted was that which was the most advisable in the circumstances in which he found himself placed. The only question therefore is, whether the vessel was by perils of the sea prevented from taking on board the rest of her cargo, and the voyage justifiably abandoned. The cases relied upon on moving show only that a mere delay or retardation of the voyage does not constitute such a loss as to render the underwriters on freight liable. It resolves itself into a question of *bonâ fides* in each case. In Phillips on Insurance, 3d edit., § 1142, it is said: "Insurance of freight covers the risk of loss of that subject by reason of a loss of either the ship by the perils insured against, whereby it is prevented from transporting the cargo, or a loss of the goods by the perils insured against, whereby the earning of freight by the transportation of them is prevented. *Abbott, C. J.*, and his associates (in *Mordy v. Jones*, 4 B. & C. 394 (E. C. L. R. vol. 10), 6 D. & R. 749 (E. C. L. R. vol. 16)), held a different doctrine in case of the vessel's putting back to Kingston, the port of departure in Jamaica, on account of sea-damage and loss of freight on part of the cargo so injured by being wet with sea-water that it was prudently and justifiably sold there on account of danger of spontaneous ignition if it had been carried on, and because the expense of delay to wash and dry it would have exceeded the amount of the freight of it. The insurers were held not to be liable for this loss, the ground stated being, that, 'if it should be held that the underwriter would be liable, it would open a temptation to a master to sail away, under like circumstances, instead of stopping until the cargo could be reshipped.' That is to say, if the Court should decide for the assured in this case, when the master's proceeding was confessedly justifiable, it might tempt some other master to sell or leave part of the cargo when it was not justifiable! The decision, supported [*274 only by such a reason, certainly weighs very little against what seems to be a plain, and is, at least now, a well-established doctrine." Mr. Arnould,—Arnould on Insurance, 2d edit., Vol. 2, p. 978, adopts the same view of that case. In *Everth v. Smith*, 2 Selw. 278, the expense of the unavoidable detention of the ship exceeded the amount of the freight: and Lord Ellenborough, in giving judgment, said: "In this case, the only inconvenience that has arisen is to be attributed to the protraction of the adventure; but that was decided in *Anderson v. Wallis*, 2 M. & Selw. 240, and *M'Carthy v. Abel*, 5 East 388, not to constitute a loss." *Brocklebank v. Sugrue*, 1 M. & Rob. 102, is a mere repetition of the doctrine of *Mordy v. Jones*. *Moss v. Smith*, 9 C. B. 94 (E. C. L. R. vol. 67), is equally wide of the present question: all that was decided there was, that mere inability to send on the *entire* cargo is not a case of constructive total loss on freight. In the present case, the vessel was by perils of the sea disabled from carrying the cargo at all; and that disability existed until the termination of the voyage. That was precisely the state of things in *Devaux v. l'Anson*, 5 N. C. 519 (E. C. L. R. vol. 35), 7 Scott 507. There, the plaintiff, the owner of a ship, effected a policy on freight at and from the Coromandel coast to Bourbon: the ship put into a port on the Coromandel coast for repairs: the plaintiff purchased a cargo and had it, ready to be sent on board, about seven miles from that port: the ship was lost by an accident in going out of dock: the policy covered perils of the

seas and all other perils, losses, and misfortunes: and it was held, that the plaintiff's interest in the profit of conveying the cargo was properly described as freight; that, the cargo being ready when the ship was about to leave the dock, the risk attached; *and that the loss was a loss within the terms of the policy. *275] [ERLE, C. J.—The master was prevented from shipping the remaining 120 tons of ore by reason of the wind blowing from the westward. Surely “perils of the sea” means something more than the ordinary fluctuations of the wind and weather.] The loss of the anchor and the injury to the windlass were occasioned by the extraordinary weather the vessel was exposed to. It cannot, of course, be said that it was *impossible* for the master to go back for the rest of the cargo. The same sort of possibility physically existed as that suggested by Maule, J., in *Moss v. Smith*. But the question is, was he bound to go back? and were the charterers bound to keep the 120 tons of copper ore until the vessel came back from Swansea to take it? Or, suppose the vessel were lost on going out the second time, or on her return from that voyage, could the underwriters on this policy have been called upon? Assuming it to be a question of reasonable degree, was the master bound to go to the nearest practicable port,—Plymouth, for instance,—to get his lost anchor replaced and his windlass repaired? [ERLE, C. J.—No doubt he would, if the distance were not unreasonably great.] The authorities bearing upon this point are extremely scanty. No doubt, it must be a case of urgent necessity which will justify the master in abandoning the voyage: *Cannam v. Meaburn*, 1 Bingh. 248 (E. C. L. R. vol. 8), 8 J. B. Moore 127 (E. C. L. R. vol. 17). In *Worms v. Storey*, 11 Exch. 427, 430,† Parke, B., says: “Under a charter-party containing such an exception, if the vessel sails in a seaworthy state, and in the course of the voyage is damaged by perils of the sea, the owner is not bound to repair it: but, if he does not choose to repair, he ought not to go to sea with the vessel in an unseaworthy state, and so cause a loss of the cargo. He ought either to repair or stop.” The question of reasonable or unreasonable *delay is discussed in 2 Phillips on *276] Insurance, 3d edit., §§ 1451, 1452. Unreasonable delay amounts to deviation: *Mount v. Larkins*, 8 Bingh. 108 (E. C. L. R. vol. 21), 1 M. & Scott 165 (E. C. L. R. vol. 28). If the plaintiff is not entitled to recover in this case, it is because the risk is still continuing and the voyage uncompleted: and, if the risk is still continuing, it is because there is no deviation.

Bovill, Q. C., and *Archibald*, in support of the rule.—The material facts are these:—The *Greenwich* having arrived at Hondeklip Bay and taken in a portion of her homeward cargo, but not having entirely discharged her outward cargo, a storm arose which rendered it necessary for her to quit the roadstead with the loss of an anchor and a damaged windlass; and she accordingly proceeded to St. Helena for the purpose of repairing the damage. Arrived there, and finding that the necessary repair could not be effected, the master thought it more prudent to discharge the remainder of his outward cargo at that port and to proceed to Swansea with so much of the copper ore as he had received on board. Assuming that all this was done *bonâ fide*, it was a voluntary abandonment of the voyage. The loss is not to

be thrown upon the underwriters on freight merely because by reason of the accidents of navigation the expense incurred in earning the freight would exceed the amount of the freight when earned. There is no such head of loss known to the law: *Everth v. Smith*, 2 M. & Selw. 278. In *Atkinson v. Ritchie*, 10 East 580, the master was held not to be justified even by a reasonable and well-grounded apprehension of a hostile embargo, in abstaining from taking the cargo on board. He must encounter the danger. The case of *Schilizzi v. Derry*, 4 Ellis & B. 873 (E. C. L. R. vol. 82), well illustrates the duty which the owner owes to the charterer. There, the declaration [*277] stated, that, by charter-party between the plaintiff and defendant, it was agreed that the defendant's ship, then in London, should sail to Galatz or Ibrail, or so near thereunto as she might safely get; and there load a cargo from the plaintiff's factor, and therewith proceed to a port in the United Kingdom, or between Havre or Hamburg, inclusive, the act of God, &c., and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever during the voyage always mutually excepted; that the ship was not prevented by any of the excepted causes from proceeding with and completing her said outward voyage; yet that the defendant made default in causing the ship to sail and proceed with all convenient speed on her said outward voyage, and before the said outward voyage was completed wrongfully caused the ship to deviate from the course of her said voyage, and wholly abandon the said voyage. The defendants pleaded,—first, that they were not guilty of the alleged breach of the charter-party,—secondly, that they were prevented by the excepted causes, to wit, by the dangers and accidents of the seas, rivers, and navigation, from proceeding with and completing the said outward voyage; upon which pleas issues were taken. It appeared that the ship reached the mouth of the Danube on the 5th of November. Galatz lies ninety-five miles up the Danube, and Ibrail twenty miles higher. At the mouth of the Danube is a bar, upon which, at the time of the arrival of the ship, there was not water sufficient to allow her to pass. On the 11th of December she sailed from the mouth to Odessa (one hundred miles distant), and there took in a cargo from other parties. It would not have been safe for her to remain off the mouth after the 11th of December: and Odessa was the nearest safe port. On the 7th of January following, there was [*278] water enough on the bar of the mouth of the Danube to enable the ship to go up to Galatz and sail with a cargo out of the river. And the Court held that both issues should be found for the plaintiff; for that the voyage was not completed, even if the vessel was prevented by any of the excepted causes from completing it; and that no such prevention was shown, but, at the most, circumstances of the excepted kind delaying the completion. Wightman, J., there said: "No doubt, the obstruction was temporary. The impossibility of waiting off the harbour's mouth does not determine the obligation to complete the voyage." And Crompton, J., said: "It would be most dangerous to hold that a temporary obstruction puts an end to the obligation." So here, the circumstance of a strong westerly wind compelling the *Greenwich* to depart from Hondeklip Bay with half her cargo on board, did not justify the master in neglecting to return

when the weather moderated to take in the remainder. *Anderson v. Wallis*, 2 M. & Selw. 240, and *Brocklebank v. Sugrue*, 1 M. & Rob. 102, are authorities to the same effect as *Everth v. Smith* and *Schilizzi v. Derry*. In *Moss v. Smith*, 9 C. B. 94 (E. C. L. R. vol. 67), a ship valued at 12,000*l.* was insured from Valparaiso to England; the freight, valued at 4000*l.*, was also insured by a separate policy: the ship, having sailed with a full cargo, consisting of 800 tons of merchandise, was compelled by stress of weather to put back to Valparaiso, where the master, finding upon survey that to repair her so as to bring home the entire cargo would cost a sum exceeding the value of the freight, though less than the value of the ship when repaired, sold her: and it was held that this was not a total loss of either ship or freight. That could be only on the ground that freight might have been earned. In the course of the argument, Cresswell, J., asks, *279] "Does an underwriter on freight undertake to pay *if the assured acts prudently in declining to earn freight?" And, in giving judgment, the same learned judge says: "I never heard of such a thing as a total loss of freight by perils of the sea, because the ship has sustained sea-damage to an amount exceeding the value of the freight. What is the nature of the contract between the shipowner and the merchant whose goods he contracts to carry on freight? The shipowner engages to carry the goods from the port of loading to the port of discharge: his contract would be absolute, but for the exception introduced into the bill of lading,—unless prevented by perils of the sea. Now, when is the shipowner said to be prevented by perils of the sea from fulfilling the contract he has entered into? When the ship is, by a peril of the sea, rendered incapable of performing the voyage. A ship is not rendered incapable of performing the voyage when she is merely damaged to an extent which renders some repairs necessary." *Driscoll v. Passmore*, 1 Bos. & P. 200, is also an authority in point. There cannot be a constructive loss of freight. There may be a loss of freight in case of the utter total or partial loss of the goods, or of such damage to the goods, by a peril insured against, as would justify their sale. But that does not arise from the mere circumstance that it will cost more to carry them to their destination than the value of the freight. Here, there was clearly nothing to justify an abandonment of the adventure.

Stewart v. The Greenock Marine Insurance Company, 1 Macqueen 328, *Benson v. Chapman*, 2 House of Lords Cases 696, and *Fawcus v. Sarsfield*, 6 Ellis & B. 192 (E. C. L. R. vol. 88), were also referred to.

Cur. adv. vult.

WILLES, J., now delivered the judgment of the Court:—

*280] "This was an insurance upon "charter freight." The charter was for a voyage from the Cape to Hondeklip Bay, an open roadstead 180 miles up the coast, there to load a cargo of copper ore, and to proceed therewith to Swansea, at a freight of so much per ton.

The vessel proceeded to Hondeklip Bay, received part of the cargo, and was ready to complete her loading by taking on board other 120 tons which were ready. A northwest storm came on, which obliged her to put to sea. In doing so the cable was slipped, and the spindle of the capstan was bent, so as to be useless until it was set straight. The remainder of the cargo could not be taken on board without

repairing the damage. The vessel did not run for the Cape, where repairs could have been obtained. She beat about in the offing for forty-eight hours, when the wind changed to southwest, and the current set to north. She then ran for St. Helena, 1800 miles off,—the master, according to the verdict, expecting to be able to repair there, and intending to return for the rest of the cargo. Upon arriving at St. Helena, it was found that the damage could not be repaired there. when the master resolved to proceed to Swansea, which he did with a cargo short by the 120 tons not shipped. The jury found that the master acted throughout as a prudent owner uninsured would have done. The question is, whether there was a total loss of the freight upon the 120 tons by perils of the sea. We are of opinion that there was not.

The damage done was not of an extraordinary character. It was capable of repair, and the means of repair were within a reasonable distance. If the master, instead of going to St. Helena, 1800 miles off, on the way home, had proceeded to the Cape, 180 miles off, the damage could have been repaired, and the freight in question earned. The proximate cause *of the loss was, the course which the [*281 master pursued in going home instead of repairing at the Cape and then returning for the rest of the cargo. All that the finding of the jury amounts to, is, that the master, in going to St. Helena, made the choice which a prudent man uninsured would have made, of a place at which to repair. But that choice, though apparently prudent, turned out to be mistaken; and so, and not by the sea-damage, which in itself was capable of repair, and ought to have been repaired if it reasonably could, the loss happened.

In effect, the master lost his freight by reason of his not proceeding to the Cape to repair, and then going to Hondeklip Bay to take in the residue of the cargo: and there was no peril of the sea which prevented him from doing that. If the wind had continued northwest, he would have done so, and earned the whole freight: and the underwriters do not insure against the consequence of a delay caused by a change of the wind.

Reliance was placed by the plaintiff upon a passage in Mr. Phillips's very able work on Insurance, § 1142, where he says that "insurance of freight covers the risk of loss of that subject by reason of a loss of either the ship by the perils insured against, whereby it is prevented from transporting the cargo, or a loss of the goods by the perils insured against, whereby the earning of freight by the transportation of them is prevented." He goes on to dispute the decision in *Mordy v. Jones*, 4 B. & C. 394 (E. C. L. R. vol. 10), where it was held that the underwriter was not liable for a loss of freight which might have been earned, but at an expense in drying the goods sea-damaged which would have exceeded the freight: and he particularly objects to the principle of Lord Tenterden's judgment, which was founded in part upon the danger of encouraging captains to go home *and [*282 charge underwriters; but he disputes it only upon the ground that in *Mordy v. Jones*, according to the learned author's view, the part of the cargo was virtually lost. We must, however, observe that in this respect he appears to have mistaken the facts of that case. The goods could not be made fit to be carried, except at an expense

equal to or exceeding the freight, but it by no means follows that they were not worth many times over the necessary expenses, or that, if the goods had been the subject of the insurance, they could have been said to be constructively lost, as between their owner and the underwriter. If the goods, for instance, were worth 1000*l.*, and the freight 100*l.*, and it required 105*l.* expenses to make them fit to be used or carried forward, they might not be worth preparing for the sake of the freight, and yet they would be short of being lost by 895*l.* Whatever, therefore, may be thought of the reasoning of Lord Tenterden, the decision has not been successfully assailed.

In *Moss v. Smith*, 9 C. B. 94 (E. C. L. R. vol. 67), it was again decided that the freight is not lost by perils of the sea, simply because the cost of the repair of sea-damage necessary to earn it would be greater than the freight. Cresswell, J., said that the loss there was by the prudence of the owner, not by a peril: and Maule, J., said that the prudent owner principle only applies to constructive total loss of ship or constructive total loss of cargo by damage *thereto*, not to expense and labour of earning freight.

Here, the captain was prudent in avoiding foul weather, but he was not prevented by perils of the sea from procuring the necessary repairs and earning the freight.

The rule to enter a verdict for the underwriter must therefore be absolute. Rule absolute.

*283]

*JONES v. TAPLING. Nov. 14.

Where the owner of the dominant tenement has exceeded the limits of his admitted right to the access of light and air, either by enlarging or altering an ancient window or opening an additional one, and has thereby put himself into such a position that the excess cannot be obstructed by the owner of the servient tenement without at the same time obstructing the admitted right, no action can be maintained for the latter obstruction,—because it was unavoidably caused by the exercise of the right of the owner of the servient tenement to obstruct the excess.

The plaintiff, being possessed of a house of three stories, with a window in each, lowered and enlarged the windows on the first and second floors, and added two new stories to the building, with windows therein. The altered windows on the first and second floors each occupied in part the space before occupied by the ancient windows: the window on the third floor remained as it had always been. The defendant, in rebuilding his premises opposite, obstructed the *whole* of the plaintiff's windows,—it being impossible (as found in a special case) to obstruct the new lights without at the same time obstructing the old ones. The plaintiff thereupon stopped up the new windows, and restored the old ones to their original state, and then required the defendant to remove the obstruction:—

Held, per tot. Cur.,—upon the authority of *Renshaw v. Bean*, 18 Q. B. 112 (E. C. L. R. vol. 83), and *Hutchinson v. Copestake*, 9 C. B. N. S. 863 (E. C. L. R. vol. 99),—that, inasmuch as the defendant could not obstruct the new lights, as he had a right to do, without at the same time obstructing the ancient lights, he was justified in the obstruction of all.

And Held by Byles, J., and Keating, J., that, the obstruction being lawful at the time of its erection, the defendant was not bound to remove it on the plaintiff's closing his new and usurped lights.

Held, by Erie, C. J., and Williams, J., that the continuance of the obstruction after the cause for its erection had been withdrawn, was an unlawful act.

THIS was an action for obstructing and keeping obstructed certain lights of the plaintiff on the west side of a warehouse No. 107, Wood Street, Cheapside, in the city of London.

The first count of the declaration stated, that, at and during all the times thereafter mentioned, the plaintiff was and still is lawfully possessed of a messuage and buildings in which there were, and still of right ought to be, divers ancient windows through which the light and air ought of right to have entered, and until the committing of the grievances by the defendant as thereafter mentioned did enter, and still of right ought to enter, into the said messuage and buildings, for the more wholesome use and occupation of the same: yet that the defendant wrongfully and injuriously built, erected, and raised, and kept and continued, a certain wall, building, and erections near to the said said windows; by reason of which premises the light and air were and are hindered and prevented from *coming and entering into or through the said windows into the said messuage [*284 and buildings of the plaintiff, and the said messuage and buildings had been and were thereby rendered dark, close, and unwholesome, and less fit and commodious for habitation, and greatly deteriorated in value.

The second count stated that the plaintiff was possessed of a messuage with certain windows through which at the times of the committing of the grievances thereafter mentioned the light and air of right ought to have entered without the obstruction thereafter mentioned: and that the defendant wrongfully kept and continued opposite and near to the said windows a certain wall upon a close in the occupation of the defendant, in such manner as to obstruct and impede the entrance of light and air which of right ought to have, and but for the said acts of the defendant would have entered the said windows, although before the said obstruction complained of the defendant was requested by the plaintiff to remove the said obstruction; and that all things had been done and happened and existed, and all times had elapsed, to entitle the plaintiff to have the said obstruction removed by the defendant; whereby the said messuage of the plaintiff was and is deteriorated in value and become less useful for occupation. Claim, 1000*l*.

The defendant pleaded,—first, not guilty,—secondly, to the first count, that the plaintiff was not nor is lawfully possessed of a messuage and buildings in which there were and still of right ought to be ancient windows or an ancient window through which the light and air ought of right to have entered and did enter, and still of right ought to enter, in manner and form as in that count alleged,—thirdly, to the last count, that the plaintiff was not possessed of a messuage with windows or a window through which the light and air *of right ought at either of the said several times when, &c., to have [*285 entered without the obstruction therein mentioned, in manner as in that count alleged. Issue thereon.

The cause came on to be tried before Cockburn, C. J., at the sittings in London after Hilary Term, 1859, when a verdict was by consent found for the plaintiff for the damages claimed in the declaration, subject to the following case:—

The plaintiff is a wholesale dealer in silk, and now carries on his business at Nos. 107, 108, and 109 Wood Street. The plaintiff had for several years prior to 1857 carried on his business at Nos. 108 and 109 Wood Street; but he acquired possession of the premises No. 107

Wood Street for the first time in the year 1857, having become the purchaser of them in the month of July in that year. Up to the time when the plaintiff acquired possession of the said premises No. 107, they were used and occupied as a public-house, known by the sign of The Magpie and Pewter Platter, and were and are in a line with and next adjoining to Nos. 108 and 109. The said premises Nos. 107, 108, and 109 abut on the rear or west side thereof upon the east side of certain premises fronting in Gresham Street West, and therein numbered 1 to 8,—hereinafter called “the Gresham Street property.” In the year 1852, the plaintiff pulled down his premises Nos. 108 and 109 Wood Street, which were then old and dilapidated houses, and erected on their site new warehouses. In doing so he altered the position and enlarged the dimensions of the windows previously existing, increased the height of the building, and set back the rear or back line of those warehouses.

A model (numbered 1) was admitted to represent for the purposes of this case the position of the windows and lights in the west side of Nos. 108 and 109 Wood *Street in the year 1852, immediately *286] before they were rebuilt as aforesaid, as well as the windows and lights of the Magpie and Pewter Platter, No. 107; and it was admitted for the purposes of this case that the windows shown by such model in the Magpie and Pewter Platter were ancient windows, and that the owners or occupiers for the time being of the Magpie and Pewter Platter were then and up to July, 1857, entitled to such access of light and air as shown by the model. It also showed the position and height of the east walls of the Gresham Street property at the same period.

The defendant, who is a carpet warehouseman, on the 23d of July, 1852, was tenant of the said Gresham Street property, and now holds the same under a lease for a term of eighty-one years since granted to him. In or about the year 1856, the defendant pulled down the buildings then standing on the Gresham Street property, in order to erect thereon a warehouse.

The plaintiff in July, 1857, immediately after his purchase of No. 107 Wood Street, made alterations in it, by lowering the first and second floors, so as to make them correspond with his adjoining new warehouses, Nos. 108 and 109, and by lowering two of the windows in such floors, so as to suit the new position of the floors. One of the lowered windows was about one foot longer than before, and the other about the same size as the old one; and both occupied parts of the old apertures. The small window on the first floor shown in the model No. 1 was blocked up. He also built two additional stories to No. 107, in the first of which, viz., the fourth story of the premises, he put out a new window; and in the fifth or attic story he placed a window extending across the entire width of the building. *These new windows and lights were so situated that it was impossible for the owners of the said Gresham Street property to obstruct or block them without also *287] obstructing or blocking to an equal or greater *extent that portion of the said windows and lights which occupied the site of the said ancient windows in No. 107.*

The said alterations and additions in No. 107 Wood Street, so far

as the windows are concerned, were completed by the plaintiff in the month of August, 1857.

After the alterations and additions to No. 107 Wood Street had been so completed, the defendant proceeded to erect his said intended warehouse and premises on the Gresham Street property, and built up the eastern wall thereof to such a height as to obstruct the whole of the windows and lights of No. 107 Wood Street.

A model numbered 2 showed the state of the windows and lights in the plaintiff's premises, Nos. 107, 108, and 109 Wood Street at the time the defendant erected his said new warehouse and premises: and it also showed the eastern boundary-wall of the defendant's said new warehouse and premises. Part of this wall is the eastern side of the defendant's warehouse, and the residue a blank wall of the same height, in continuation of the warehouse wall. The new upper windows of No. 107 could not have been obstructed in a more convenient manner than by building up a wall of sufficient height on the defendant's premises.

On the 8th of September, 1857, the following letter was written by the attorneys for the defendant to the attorney for the plaintiff, and received by the latter:—

"Dear Sir,

"8th September, 1857.

"Tapling v. Jones.

"We have received your notice.(a) Our client claims the right to erect his warehouse in any manner he thinks proper, without being interfered with by Mr. Jones. You are aware that, when Mr. Jones erected his present warehouse, in 1854, he, much to the *annoyance of our client, put out the present windows in the back front of Nos. 108 and 109 Wood Street. At the time he did so, he was cautioned, that, when Mr. Tapling rebuilt his warehouse (which he then contemplated doing), these windows would be all built against. We cannot conceive upon what ground Mr. Jones claims to interfere with our client's building. He has no rights or easements of any kind over Mr. Tapling's property.

"Jones v. Tapling (first suit).

"As this motion was ordered to stand over until November, we do not care to be troubled about the matter now, but will furnish you with all the information you are entitled to in due course. You appear to think that Mr. Jones may do anything he likes, but that Mr. Tapling must not do anything without his (Mr. Jones's) permission. Mr. Jones has during the present month put out additional windows overlooking our client's property. This he had no right to do; and we object to their remaining, and shall assuredly take measures to block them up,

"LANGLEY & GIBBON."

Whilst the said eastern wall of the defendant's warehouse and premises was in course of erection, the following correspondence passed between Mr. Lloyd, the attorney for the plaintiff, and Messrs. Langley & Gibbon, the attorneys for the defendant:—

"16th October, 1857.

"Dear Sirs,—My client, Mr. Jones, finds, that, notwithstanding the various proceedings taken by him to prevent Mr. Tapling from building against him and darkening his lights, he still continues to do so,

(a) Which had no bearing on the present question.

and is raising a wall in Flying Horse Court to a much greater height than the former ones complained of: and he desires me to require of him to desist from his conduct, and to inform you, as solicitors to Mr. *289] Tapling, that he will consider the same as an aggravation *of the injury he is sustaining, and will apply to the Court to restrain him in his proceedings, and to be ordered to pull down such wall, so as not to further darken his premises.

"HERBERT LLOYD."

"17th October, 1857.

"Dear Sir,—On the 8th of September last, we wrote you in effect as follows, viz., that our client Mr. Tapling claimed the right to erect his warehouse in any manner he thought proper, without being interfered with by Mr. Jones. You are aware, that, when Mr. Jones erected his present warehouse, in 1854, he, much to the annoyance of our client, put out the present windows in the back front of Nos. 108 and 109 Wood Street. At this time he (Mr. Jones) was cautioned, that, when our client rebuilt his warehouse (which he then contemplated), these windows would be all built against. We deny that your client has any rights or easements whatever over Mr. Tapling's property. With respect to No. 107 Wood Street, we gave you notice at the time Mr. Jones was making the alterations and additions, about a month or six weeks since, that Mr. Tapling objected to the additional windows overlooking his property, and that Mr. Jones had no right to put them out. We further informed you that our client would take measures to block them out.

LANGLEY & GIBBON."

"Dear Sirs,

"19 October, 1857.

"Jones v. Tapling.

"I need not enter into a discussion with you upon the conduct of the defendant, which now accounts for the placing the tarpaulings in the way they were. My client has all along warned the defendant against impeding his lights; and the defendant will have to answer *290] for the same. I now require him to *discontinue the wall he has erected at the back of my client's premises, and to pull down the same; and inform you that I have laid papers before counsel to prepare a bill in Chancery for an injunction to restrain him from further pursuing the injurious course he has been and is pursuing, and that the defendant may be ordered to pull down the same. With regard to the caution you allude to, my client denies it in the strongest terms, and states that Mr. Tapling never made any objection till it was (if any) made through you, and has stated that he would not have acted as he has but for Mr. Jones refusing to let him have his house No. 110 Wood Street.

"H. LLOYD."

"Dear Sir,

"26th October, 1857.

"Tapling v. Jones.

"As we have already informed you, our client claims the right to erect his warehouse in any manner he pleases, without being interfered with by Mr. Jones. We deny that your client has any ground to object to what Mr. Tapling has done or is now doing. We are prepared to meet any proceedings you may institute.

"LANGLEY & GIBBON."

The said eastern wall of the defendant's new warehouse and premises was completed by the end of October, 1857. Shortly before the 4th of February, 1858, the plaintiff, by the advice of counsel, caused the altered windows in No 107 Wood Street to be restored to their original state, and the new windows in the upper story to be blocked up. The mode in which such new windows have been blocked up has been by filling up the spaces with brick-work.

On the 4th of February, 1858, the attorney for the plaintiff addressed to the defendant a letter, of which the following is a copy:—

*"4th February, 1858.

'Sir,—Mr. Hugh Jones has consulted me upon the wall you [*291 have (contrary to repeated warnings) thought proper to erect at the back of his premises in Wood Street, whereby the admission of light and air to his house No. 107 in that street has been almost entirely obstructed. In order that there may not exist even the shadow of a pretence for your continuing such obstruction, Mr. Jones has blocked up and abandoned any lights respecting which there might exist the slightest question: and he now requires you to pull down such wall and restore his said premises to their former light and air: and I have to inform you, that, unless you comply with this requisition within ten days from this date, an action and other proceedings will be commenced against you to abate such obstruction, and to recover from you damages for the same and for any continuance thereof.

"H. LLOYD."

To the last-mentioned letter the attorneys for the defendant sent the following reply:—

"6th February, 1858.

"Dear Sir,

"Tapling and Jones.

"Mr. Tapling has handed us your letter. In reply thereto, we have to state we advised our client he had an undoubted right to build the walls complained of in your letter of the 4th instant, and that this right was incident to his property, and wholly independent of Mr. Jones's position or his interest in No. 107 Wood Street. But, assuming such not to be the case, it is quite clear the wrongful acts done by Mr. Jones compelled our client to build the walls as he has done. In erecting them he has expended a large sum of money, and has planned his warehouse accordingly. All the works connected with our client's building adjoining Mr. Jones's premises, including fire-proof floors, *iron columns, girders, and other expensive works, excepting [*292 only internal finishing, have been completed some weeks past. We would, therefore, with the utmost confidence submit that anything your client may now do will not entitle him to call upon ours to alter in any way the present walls or structure; and we have to inform you that we shall resist any proceedings you may institute. In forming an opinion upon this matter, you will bear in mind that it was the wrongful acts of Mr. Jones which compelled our client to take the course he has done, thereby entailing additional expense in the erection of his warehouse.

"LANGLEY & GIBBON."

The defendant refused to remove the said eastern wall of his ware-

house and premises or any part of it; and it still remains as represented in model No. 2.

The Court was to be at liberty to draw any inference of fact from the above statement which they should think a jury might properly have drawn.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover in respect of the obstruction of light and air complained of. If they should be of opinion that he was so entitled, then the verdict entered for the plaintiff was to stand, and the damages to be reduced to 40s. If they should think that the plaintiff was not so entitled, then the verdict entered for the plaintiff was to be set aside, and a verdict entered for the defendant.

Cleashy, Q. C. (with whom was *Mellor*, Q. C.), for the plaintiff.(a)—
 *293] The question raised by this case differs materially from that which was decided by the Court of Queen's Bench in *Renshaw v. Bean*, 18 Q. B. 112 (E. C. L. R. vol. 83), and to a certain extent sustained by the Exchequer Chamber in *Hutchinson v. Copestake*, 9 C. B. N. S. 863 (E. C. L. R. vol. 99); for, here, the question is, not so much whether the defendant was justified in erecting the building which constitutes the obstruction complained of, as whether he had a right to continue the obstruction after the plaintiff had by closing his new lights removed the only justification or excuse for its erection. It will be contended on the part of the defendant, that the plaintiff, by altering his premises as he did, has altogether abandoned the easement he before possessed. No doubt, an easement, like any other right, may be abandoned: but that is always a question of intention (*Moore v. Rawson*, 3 B. & C. 332 (E. C. L. R. vol. 10), 5 D. & R. 234 (E. C. L. R. vol. 16)), as to which all difficulty is removed by the facts of this case. *Chandler v. Thompson*, 3 Campb. 80, is a distinct authority to show that the right is not lost by the plaintiff's abortive attempt
 *294] to enlarge it: (b) and that case is confirmed by *Blanchard v. Bridges*, 4 Ad. & E. 176 (E. C. L. R. vol. 31), 5 N. & M. 567 (E. C. L. R. vol. 36). [*WILLIAMS, J.*—*Garritt v. Sharp*, 3 Ad. & E. 325, 4 N. & M. 834 (E. C. L. R. vol. 30), had been decided in the interim. It may be that the right to light rests upon a qualified grant, and is liable to be defeated by any alteration in the size and position

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That, under the circumstances in the special case mentioned, the plaintiff did not at any time abandon or lose his right to the enjoyment of the light and air coming to the windows of the house No. 107 Wood Street:

"2. That the defendant never acquired the right to deprive the plaintiff of the access of light and air to the plaintiff's house:

"3. That the plaintiff did not by the alteration of the old windows, or the opening of additional ones, lose his right to the access of light and air to his house as supplied by the old windows; and that, by the restoration of the said windows to their original state, the defendant's building became an unlawful obstruction to the plaintiff's legal right to the enjoyment of such light and air:

"4. That great inconveniences would follow, and the improvement of dwelling-houses be much obstructed, if it were to be held, that, by altering old windows or opening new ones in additional stories, the right to the access of light and air was to be forfeited, or the adjoining owner entitled to block them out."

(b) It was there laid down by *Le Blanc, J.*, that, if an ancient window be raised and enlarged, the owner of the adjoining land cannot lawfully obstruct the passage of light and air to any part of the space occupied by the ancient window, although a greater portion of light and air be admitted through the unobstructed part of the enlarged window than was anciently enjoyed.

of the ancient windows.] *Garritt v. Sharp* is not very much to the purpose. The plaintiff had a barn, in the side of which, adjoining the defendant's premises, were apertures by which chiefly the barn was lighted. The plaintiff converted the barn into a malt-house, and cut windows where the apertures had been in the barn. The defendant erected (on his own land) a fence before the windows, which obstructed the access of light. In an action on the case for such obstruction, evidence was offered at the trial to show that the mode of enjoying the light had been essentially altered by the plaintiff himself in a manner prejudicial to the defendant. The judge did not receive the evidence, but directed the jury, if they thought that the defendant had left the plaintiff less light than he enjoyed before the present windows were made, to give damages for such diminution: and it was held, on motion for a new trial, that evidence of the above description was receivable, and that it might have appeared from such evidence that the plaintiff had altogether lost his right to the easement in question. In pronouncing the decision of the Court, Lord Denman says: "It is enough to say that a party may *so alter the mode in which he has been permitted to enjoy [*295 this kind of easement as to lose the right altogether; and, in this case, some part even of the plaintiff's proofs made it proper that the opinion of the jury should be taken on that subject." In *Moore v. Rawson*, which was an action on the case by a reversioner for obstructing lights, it appeared that the plaintiff's messuage was an ancient house, and that adjoining to it there had formerly been a building, in which there was an ancient window next the lands of the defendant, and that the former owner of the plaintiff's premises, about seventeen years before, had pulled down this building, and erected on its site another *with a blank wall* next adjoining the premises of the defendant; and the latter, about three years before the commencement of the action, erected a building next the blank wall of the plaintiff, who then opened a window in that wall in the same place where the ancient window had been in the old building: and it was held that the plaintiff could not maintain an action against the defendant for obstructing the new window, because *by erecting the blank wall, he not only ceased to enjoy the light, but had evinced an intention never to resume the enjoyment.* Abbott, C. J., says: "By building the blank wall, he may have induced another person to become the purchaser of the adjoining ground for building purposes, and it would be most unjust that he should afterwards prevent such a person from carrying those purposes into effect." Here, the question is, whether, by endeavouring to obtain more than he had before, the plaintiff loses his existing and undisputed right. Lord Campbell, in delivering the judgment of the Court in *Renshaw v. Bean*, 18 Q. B. 112, 129 (E. C. L. R. vol. 83), says: "We are of opinion that this action is not maintainable. But we do not proceed upon the ground that the plaintiff by the alteration of his windows had *entirely lost the right which he had before [*296 enjoyed, of having light and air through such portions of the present windows as formed portions of the ancient windows before the alteration: and we must be understood as not meaning to overturn any of the cases on which the plaintiff's counsel has relied. But the plaintiff has acquired nothing more in addition to that former right;

and if, by the alterations which he has made, he has exceeded the limits of that right, and has put himself into such a position that the excess cannot be obstructed by the defendant in the exercise of his lawful rights on his own land without at the same time obstructing the former right of the plaintiff, he has only himself to blame for the existence of such a state of things, and must be considered to lose the former right which he had, at all events until he shall, by himself doing away with the excess and restoring his windows to their former state, throw upon the defendant the necessity of so arranging his buildings as not to interfere with the admitted right." The judgment of the Exchequer Chamber in *Hutchinson v. Copestake*, 9 C. B. N. S. 863 (E. C. L. R. vol. 99), though it recognises *Renshaw v. Bean*, still treats the right of the dominant tenant as not absolutely gone by the alteration. [WILLIAMS, J.—Suppose a mill-owner having a right to a weir raises it to the prejudice of the right of another riparian proprietor, the latter would have a right to reduce it to its original level; and, if the obstruction were all in one piece, he might remove the whole. But clearly the mill-owner would not thereby lose the right which he really had.]

Assuming the defendant to have been justified in raising the obstruction, is he justified in continuing it after the plaintiff has abandoned his new lights? *Cawkwell v. Russell*, 26 Law J., Exch. 34, is *297] an authority to show that a legal right is not lost by an excessive claim. In *Cooper v. Hubbuck*, 7 Jurist, N. S. 457, it was held by the Master of the Rolls (Sir J. Romilly) that a person who has the right to light and air over the land of another cannot alter the size and position of his windows so as *materially* to prejudice the neighbouring owner over whose land he has the easement; and that, where the alteration is material, the owner of the easement may by restoring the windows to their original condition regain the easement which he originally enjoyed. The principle upon which these cases proceed is thus stated in the judgment,—“A person opens a window, letting in light and air, over the land of his neighbour; and after an uninterrupted enjoyment for twenty years he acquires an absolute right to that easement over his neighbour's land, and, as in the case of a footpath or carriage-road, the law presumes a grant of the easement. But the easement which he has thus acquired cannot be enlarged by any act of his; it is limited, in the case of a footpath, to a footpath, and he cannot turn it into a carriage-road; and, in the case of a window or right of light, the easement must be confined substantially to that which he has already got; he cannot afterwards make it a much larger and more important right. For instance, if a man opens a window, and obtains a right to light and air through that window over his neighbour's land, he cannot by reason of such easement open another window ten feet distant, and claim an easement in respect of that window also: and, accordingly, what appears to me to be the principle of all the cases referred to by the Lord Chief Justice in *Renshaw v. Bean*, is this, to use the words of the Chief Justice, ‘whether the alteration is material or not.’ It is very important to observe,—and upon this I wish particularly to state what my view is,—*298] what is meant by the word ‘material.’ No doubt, every alteration is ‘material’ to the person who makes it, otherwise

he would not make it: but, as I understand it, the question is, whether the alteration is material to the person over whose land the easement is, that is, whether he is prejudiced,—whether the enjoyment of his property is to any extent diminished by reason of the alteration made in the lights. For, it is quite clear that an alteration may be made without ‘materially’ prejudicing the person over whose property the easement is. Suppose a man has four windows, all close to one another, looking over another man’s land, and in the centre between these four he opens another window, it is difficult to see in what way that could prejudice the persons over whose land it looks; and, if any wrong whatever is done, it is, to use an expression which is sometimes made use of in the books, a ‘damnum absque injuriâ.’ Accordingly, in all these cases, I should consider whether in fact the land over which the easement is enjoyed is in any degree prejudicially affected by the alteration.” [BYLES, J.—The obstruction here having been lawfully made, would a court of equity order its removal, upon the new lights being closed? It might be that the erection which constitutes the obstruction was built at enormous cost.] The question must turn upon whether or not the original right continues to exist. [WILLIAMS, J.—Assuming that the defendant under the circumstances had a right to obstruct both the new and the old lights, and that the owner by abandoning his new lights regain his old ones, when does his right of action begin?] As soon as the defendant, having notice of the altered state of things, continues the obstruction, having had a reasonable time for removing it after notice from the plaintiff that he had abandoned the new lights.

**Archibald* (with whom was *Hawkins*, Q. C.), *contra* (a)— [299] From the course pursued by the plaintiff when his alterations were made in the house No. 107 Wood Street, it is clear that the new windows were intended to be permanent. The defendant, therefore, upon the authority of *Renshaw v. Bean*, 18 Q. B. 112 (E. C. L. R. vol. 83), and *Hutchinson v. Copestake*, 9 C. B. N. S. 863 (E. C. L. R. vol. 99), clearly was justified in obstructing the whole, seeing that it was impossible to exercise his unquestioned right of obstructing the new lights without at the same time obstructing the old ones. Having, then, a perfect right to erect the obstruction, it follows, it is submitted, that he infringes no law by the continuance of that which was lawful

(a) The points marked for argument on the part of the defendant were as follows:—

“1. That, by the alteration of the old windows and lights in No. 107 Wood Street, and the opening of additional ones, under the circumstances stated in the special case, the plaintiff lost or abandoned his right to the access of light and air as supplied by the old windows:

“2. That the plaintiff did not by the restoration of the said windows to their original state, regain the right which he had so lost or abandoned:

“3. That, under the circumstances mentioned in the case, the defendant had a legal right to build the eastern wall of his new warehouse and premises on the Gresham Street property in the manner and to the height described in the case and shown by the models, and to use and enjoy his said Gresham Street property free from any easement whatever:

“4. That, notwithstanding the subsequent restoration of the said windows to their original state, the defendant was and is legally entitled to maintain and continue the said eastern wall of his said new warehouse and premises:

“5. That the continuance of the said eastern wall of the defendant’s new warehouse and premises since the restoration to their original state of the said windows in No. 107 Wood Street, is not an unlawful obstruction of the said restored windows, or of any access of light and air as supplied by the same to which the plaintiff may be entitled.”

*300] at the time of its erection. It has been *usual in these cases to speak of a *right to obstruct*. But that, it is submitted, is an inaccurate expression. The only right which is known to the law is, the right of dominion over one's own property and its enjoyment,—a right, as applied to lights, of the owner to build to the extremity of his own land, with as many windows as he pleases, subject to his neighbour's prior rights. [WILLIAMS, J.—The obstruction might be placed on the land of a third person.] Still, it would be exercising an act of dominion over the servient tenement. The defendant in this case could only exercise his right to obstruct by reason of his property having been by the usurpation of the plaintiff discharged of the easement. These easements (as it has been usual to call them) may be treated as implied grants upon condition, viz. that no attempt will be made to enlarge the right. An easement may be abandoned by non-user or by encroachment. An encroachment like this, which so confuses the old and the new lights that the one could not be obscured without at the same time interfering with the other, in reality amounts to an abandonment of the ancient right. It would be easy to suggest cases where detriment to the servient tenement would accrue from an encroachment of this sort by the owner of the dominant tenement. In *Gale on Easements*, 2d edit. p. 375, the learned author, in dealing with this subject, says: "Upon the question whether a party is still at liberty to restore his tenement to its former condition and recur to his former enjoyment, there is no express authority in the English law. It should seem, however, that he would have no such right, as he would have clearly evinced an intention to relinquish his former *301] mode of enjoyment; (a) and, in *addition to the actual encroachment, the uncertainty caused by the attempted extension of the right would of itself impose a heavier burthen upon the owner of the servient tenement, if such return to the original right were permitted." [ERLE, C. J.—Does the author exemplify what he means, or refer to any authority in support of the position?] He does not. [WILLIAMS, J.—It is difficult, since Lord Tenterden's Act (2 & 3 W. 4, c. 71), to conceive how the right to light can be rested upon an implied grant. If the estate is out on lease, the owner of the reversion has no power to obstruct new windows opened on the adjoining land, and yet it would seem that under that Act the right would be gained by twenty years' user. Before the Act, the acquiescence of the lessee for years would not have bound the reversioner. BYLES, J., read the 1st and 2d sections of Lord Tenterden's Act.] In s. 3, the words "by custom, prescription, or grant," are omitted. In *Baker v. Richardson*, 4 B. & Ald. 579 (E. C. L. R. vol. 6), where lights had been enjoyed for more than twenty years contiguous to land which within that period had been glebe land, but was conveyed to a purchaser under the 55 G. 3, c. 147, it was held that no action would lie against such purchaser for building so as to obstruct the lights, inasmuch as the rector, who was only tenant for life, could not grant the easement, and therefore no valid grant could be presumed. In no case where there has been a right to build has the party exercising that right been held to be under any obligation to remove the obstruction. In *Moore v.*

(a) Citing *Moore v. Rawson*, 3 B. & C. 332 (E. C. L. R. vol. 10), 5 D. & R. 234 (E. C. L. R. vol. 16), and *Garritt v. Sharp*, 4 N. & M. 834, 3 Ad. & E. 325 (E. C. L. R. vol. 30).

Rawson, 3 B. & C. 336 (E. C. L. R. vol. 10), Bayley, J., says: "The right to light, air, or water is acquired by enjoyment, and will, as it seems to me, continue so long as the party either continues that enjoyment or shows an intention to continue it. In this case, the former owner of the plaintiff's premises had acquired a right to the [*302] enjoyment of the light; but he chose to relinquish that enjoyment and to erect a blank wall instead of one in which there were formerly windows. At that time he ceased to enjoy the light in the mode in which he had used to do, and his right ceased with it." Littledale, J., who goes very fully into the origin of these rights, says: "There is a material difference between the mode of acquiring a right of way or of common and a right to light and air. The latter is acquired by mere occupancy: the former can only be acquired by user, accompanied with the consent of the owner of the land; for, a way over the lands of another can only be lawfully used in the first instance with the consent, express or implied, of the owner. A party using the way without such consent would be a wrongdoer; but, when such a user, without interruption, has continued for twenty years, the consent of the owner is not only implied during that period, but a grant of the easement is presumed to have taken place before the user commenced. The consent of the owner of the land was necessary, however, to make the user of the way (from which the presumption of the grant is to arise) lawful in the first instance. But it is otherwise as to light and air. Every man on his own land has a right to all the light and air which will come to him, and he may erect, even on the extremity of his land, buildings with as many windows as he pleases. In order to make it lawful for him to appropriate to himself the use of the light, he does not require any consent from the owner of the adjoining land. He therefore begins to acquire the right to the enjoyment of the light by mere occupancy. After he has erected his building, the owner of the adjoining land may afterwards within twenty years build upon his own land, and so obstruct the light which would otherwise pass to the building of his neighbour. But, if the light be [*303] suffered to pass without interruption during that period to the building so erected, the law implies from the non-obstruction of the light for that length of time that the owner of the adjoining land has consented that the person who has erected the building upon his land shall continue to enjoy the light without obstruction, so long as he shall continue the specific mode of enjoyment which he had been used to have during that period. It does not, indeed, imply that the consent is given by way of grant; for, although a right of common (except as to common appendant), or a right of way, being a privilege of something positive to be done or used in the soil of another man's land, may be the subject of legal grant, yet light and air, not being to be used in the soil of the land of another, are not the subject of actual grant; but the right to insist upon the non-obstruction and non-interruption of these more properly arises by a covenant which the law would imply not to interrupt the free use of the light and air. The right, therefore, is acquired by mere occupancy, and ought to cease when the person who so acquired it discontinues the occupancy. If, therefore, as in this case, the party who has acquired the right once ceases to make use of the light and air which he had appropriated to

his own use, without showing any intention to resume the enjoyment, he must be taken to have abandoned the right." When once it is proved that the obstruction was justifiable, the authorities are clear that the owner of the servient tenement is under no obligation to remove it. In *Liggins v. Inge*, 7 Bingh. 682 (E. C. L. R. vol. 20), 5 M. & P. 712, the plaintiff's father, by oral license, permitted the defendants to lower the bank of a river, and make a weir above the plaintiff's mill, whereby less water than before flowed to the plaintiff's mill: and it was held that the plaintiff could not sue the defendants *304] for continuing the weir. Some expressions in the judgment in that case are pointedly applicable here. The Court say: "There is nothing unreasonable in holding that a right which is gained by occupancy should be lost by abandonment. Suppose a person who formerly had a mill upon a stream should pull it down and remove the works with the intention never to return,—could it be held that the owner of the other land adjoining the stream might not erect a mill and employ the water so relinquished? or that he could be compellable to pull down his mill, if the former millowner should afterwards change his determination, and wish to rebuild his own? In such case it would undoubtedly be a subject of inquiry by a jury, whether he had completely abandoned the use of the stream, or had left it for a temporary purpose only; but that question being once determined, there seems no ground to contend that an action would be maintainable against the person who erected the new mill, for not pulling it down again after notice." Although the Court of Queen's Bench in *Renshaw v. Bean* profess to guard themselves against being supposed to decide that an attempt on the part of the dominant owner to enlarge his right operates as an abandonment of the easement which he originally had, it is submitted that the whole foundation of the judgment is based upon that presumption. But, whether the conduct pursued by the plaintiff in this case amounted to an abandonment or not, if the erection by the defendant of his wall was at the time justified by the acts of the plaintiff, he cannot upon any principle of justice be bound to remove the obstruction; the right to light being in the nature of a grant of an easement subject to the condition that it shall not be used, or, in other words, that no encroachment shall be made, to the detriment of the servient tenement. Where a footway exists, and an attempt is made to enlarge it *305] into a carriageway, it is easy for the owner of the servient tenement to obstruct the excess without at all interfering with the legal right which the owner of the dominant tenement before had. So, in the case of a riparian proprietor lowering a weir. But where, as here, the admitted right and the encroachment are so intermixed that the latter can only be obstructed by an obstruction of the whole, the owner of the servient tenement must necessarily have a right to obstruct the whole, by analogy to the cases of confusion mentioned in *Renshaw v. Bean*. In *Garritt v. Sharp*, 3 Ad. & E. 325 (E. C. L. R. vol. 30), 4 N. & M. 834, it is conceded that there may be such an alteration in the mode of enjoyment as to amount to an abandonment of the right: and *Hutchinson v. Copestake* substantially decides the same thing. [BYLES, J.—The whole judgment reposes on this,—that the right is not gone if the new parts might have been obstructed

without interfering with the old lights.] In *Lawrence v. Obee*, 3 Campb. 514, Lord Ellenborough ruled, that, if an ancient window has been completely shut up with brick and mortar above twenty years, it loses its privilege. Besides, it may well be contended, upon the authority of *Pickard v. Sears*, 6 Ad. & E. 469 (E. C. L. R. vol. 33), 2 N. & P. 488, and that class of cases, that the plaintiff, having by his acts and representations induced the defendant to incur considerable expense upon the faith of the existence of a given state of things, cannot now turn round and insist upon the defendant's undoing what he has done. The course adopted by the defendant was the only one he could conveniently have adopted for the purpose of obstructing an encroachment of this sort. [ERLE, C. J.—I believe no case has yet determined that the dominant proprietor loses his right by attempting to enlarge it.] It is submitted that the defendant is entitled to judgment either on the ground of the forfeiture by the *plaintiff [*306 of his ancient right, or on the ground that the defendant was justified in erecting the obstruction, and in continuing it when erected.

Cleasby, in reply.—The judgment of the Exchequer Chamber in *Hutchinson v. Copestake* would apply to the two lower windows here if they had not been restored to their original position and dimensions. *Renshaw v. Bean* does not, as is suggested, rest upon any supposed abandonment of the easement. The main contention on the part of the defendant is, that he is under no legal obligation to pull down that which the law justified him in erecting at the time. The obvious answer to that, however, is, that the law excuses the defendant for obstructing that to which the plaintiff had no right, but not for obstructing that to which his right was undoubted.

Cur. adv. vult.

The Court being divided, the Judges now proceeded to deliver their opinions seriatim, as follows:—

KEATING, J.—This was a special case stated in an action for obstructing and keeping obstructed certain lights of the plaintiff.

In 1857, the plaintiff became possessed of No. 107, Wood Street, in the city of London, then a public-house three stories high, with one window in each story; and in that year he made alterations in it, by lowering the first and second floors, so as to make them correspond with those of his adjoining warehouses, then recently erected, and lowering the windows in those floors in a similar way, one window of the three being retained in its original position. He then added two new stories, opening in the first of them a new window, and in the highest another window or light *which extended across the [*307 entire width of the building; the whole of which was thus made to form part of his warehouses.

The defendant, after the completion of the plaintiff's alterations, proceeded, in altering his own buildings, to erect a wall to such a height as to obstruct the whole of the said windows and lights. It was stated as a fact that the obstruction could not have been made in a more convenient manner, and that it was impossible to have obstructed the new lights without at the same time obstructing the ancient window.

The wall of the defendant's new warehouse and premises constituting the obstruction was completed at the end of October. During

the months of September and October, 1857, a correspondence took place between the attorneys for the plaintiff and defendant respectively, the former denying and the latter asserting the defendant's right to build the obstruction in question.

Previously to the 4th of February, 1858, the plaintiff, under the advice of counsel, blocked up the new windows, and restored the altered windows to their original size and proportion: and upon that day the plaintiff's attorney gave to the defendant notice that he had done so, calling upon the defendant to remove the obstruction. This the defendant refused to do, whereupon the present action was commenced on the 24th of February, 1858.

Upon these facts, two questions arise,—first, was the defendant justified in erecting the obstruction complained of? and, if so, secondly, was he justified in continuing it after the notice of the 4th of February?

As to the first point,—Had the alteration made by the plaintiff consisted wholly in the enlargement of all the ancient windows of No. 107 in the manner stated, the question would have been concluded in *308] favour of the defendant by the cases of *Renshaw v. Bean*, 18 Q. B. 112 (E. C. L. R. vol. 83), and *Hutchinson v. Copestake*, in error, 9 C. B. N. S. 863 (E. C. L. R. vol. 99). But, inasmuch as, whilst altering the ancient windows in two of the stories of his warehouse and opening new ones in the additional stories, the plaintiff retained one ancient window unaltered, it becomes necessary to consider the point upon which three of the Judges in the case in error expressly reserved their opinion, and to decide whether, in order to justify the obstruction, there is any substantial distinction between the case where the alteration consists in acquiring new and unprivileged light by means of the enlargement of ancient windows, and that in which such new light is acquired by the addition of new windows; the effect of the alteration upon the servient tenement in each case being the same.

I concur with the rest of the Court in the opinion that there is no real distinction between the two cases, and that the grounds upon which the judgment in *Renshaw v. Bean*, and the opinion of Mr. Justice Crompton and Mr. Justice Hill in *Hutchinson v. Copestake* proceeded, and which recognise no such distinction, are quite satisfactory.

But, assuming that the defendant was justified in erecting the obstruction complained of, was he also justified under the circumstances in continuing it after notice that the plaintiff had closed up the new windows and restored those altered to their original position and dimensions?—a question, undoubtedly, of difficulty and importance.

The English law is so peculiar in its provisions respecting lights, that, in considering a question of any novelty relating to them, little assistance can be derived from analogies that might be furnished by the laws of other countries. I am not aware of any other system of *309] law by which the remedy of the owner of land for an invasion of its privacy by his neighbour opening new windows upon it is confined to their obstruction; but it is certain, that, by our law, the only mode by which an owner of land can prevent his neighbour from acquiring the right to light through windows looking upon it, is, by exercising his own right of building upon his own land so as

to obstruct them; and his omission to do so within twenty years gives to his neighbour a right to the light, and deprives himself of the right to interfere by building or otherwise with that state of things to which he is thus taken conclusively to have assented. The state of the law as to the nature of the rights of the dominant and servient owners respectively, is thus clearly stated by Littledale, J., in his judgment in the case of *Moore v. Rawson*, 3 B. & C. 340 (E. C. L. R. vol. 10), 5 D. & R. 234 (E. C. L. R. vol. 16). After referring to the right of obstruction within twenty years, the judgment thus proceeds,—“But, if the light be suffered to pass without interruption during that period to the building so erected, the law implies from the non-obstruction of the light for that length of time, that the owner of the adjoining land has consented that the person who has erected the building upon his land shall continue to enjoy the light without obstruction, so long as he shall continue the specific mode of enjoyment which he had been used to have during that period.” It would appear, therefore, that the consent implied by law from the uninterrupted user of light for twenty years is not a consent on the part of the servient owner that the enjoyment shall continue without obstruction for any given time, but only so long as the specific mode of user to which he has assented shall continue. Accordingly, it was held in *Moore v. Rawson*, that, although twenty years’ user is indispensable to the acquisition of a right to light, yet such right may be lost by a disuser for a shorter period. *In that case the plaintiff, having a building with ancient lights used as a weaver’s shop, pulled it down, and erected [310 on the same site a stable (afterwards used as a wheelwright’s shop), having a blank wall next the defendant’s land. Fourteen years afterwards, the defendant built upon his own land, and the plaintiff then opened a window in the same place where there had been a window in the old wall: and it was held that he could not recover for continuing the obstruction to such window, on the ground that the fact of his disuser or ceasing to enjoy the right, unaccompanied by any act at the time indicating an intention to resume the enjoyment within a reasonable time, operated as an abandonment of the right, and extinguished it. “I think,” said Bayley, J., “that, according to the doctrine of modern times, we must consider the enjoyment as giving the right; and that it is a wholesome and wise qualification of that rule to say that the ceasing to enjoy destroys the right, unless at the time when the party discontinues the enjoyment, he does some act to show that he means to resume it within a reasonable time.” This case was before the Prescription Act, 2 & 3 W. 4, c. 71; but that statute, which increases so much the facilities for acquiring the right to light in certain cases, ought certainly not to be construed so as to lessen the rights of the servient owner more than its enactments strictly require. The case also was one of non-user or ceasing to enjoy. But the case of *Garritt v. Sharp*, 3 Ad. & E. 325 (E. C. L. R. vol. 30), 4 N. & M. 834, was one of misuser or alteration, decided since the statute, and where the same principle was applied. There, the plaintiff had stopped up some ancient apertures in a barn, through which light and air were furnished to it, and converted others into latticed windows, and brought his action for the obstruction of the latter. Lord Chief Justice Tin-

*311] dal, who tried the cause, in effect *directed the jury that, if the defendant had obstructed any portion of the light admitted through the original apertures, the plaintiff was entitled to damages for such diminution. A new trial was granted, upon the ground that the jury were not required by the Judge to consider whether the plaintiff had "essentially varied" the manner in which the light was enjoyed. "It is enough," said Lord Denman, in delivering the judgment of the Court,—of which Mr. Justice Littledale was still a member,—“to say that a party may so alter the mode in which he has been permitted to enjoy this kind of easement as to lose the right altogether.”

In *Blanchard v. Bridges*, 4 Ad. & E. 176 (E. C. L. R. vol. 31), 5 N. & M. 567 (E. C. L. R. vol. 36), the acts of the dominant owner which were held to take away the right were undoubtedly very strong: but the case is important as showing how entirely the foundation of the right to light since the Prescription Act is the same as before it. Mr. Justice Patteson, in delivering the judgment of the Court, clearly lays it down that “the act of the owner of the land from which the right flows must have reference to the state of things at the time when it is supposed to have taken place: and, as the act of the one is inferred from the enjoyment of the other owner, it must in reason be measured by that enjoyment.” That such alteration by the dominant owner as obliges the servient proprietor, in obstructing the unprivileged light, to obstruct likewise that which was privileged, will take away the right at least for the time, was distinctly decided by the Court of Queen’s Bench in *Renshaw v. Bean*, where it was held that such an alteration was a defence under a traverse of the right: and that principle (in cases where the windows had all been enlarged) was affirmed by the Exchequer Chamber in *Hutchinson v. Copestake*.

*312] It appears to me, therefore, that these authorities *show the true principle upon which the rights of owners of adjoining lands, in respect of lights acquired by user, are placed, namely, that the rights of the servient owner in respect of his land being limited only by the user to which he has assented, and for so long only as it is substantially adhered to, the non-user by the dominant owner indicative of an abandonment of the right so acquired by him, or its essential misuser to the prejudice of the servient proprietor, does not so much confer upon the latter any new rights of obstruction as that it remits him to his former territorial rights to the extent to which those conditions have been violated, upon which alone his consent to their limitation was given; and that his exercise of such his rights can never be questioned by the dominant owner.

The result would be, that the solution of the second question in the present case would depend upon the answer given to the first, and be in favour of the defendant.

It is true, that, in such cases as the present, the effect of applying the principle as above stated operates practically as an extinguishment of the former right. But, surely there is nothing unjust or unreasonable in requiring that a person who exercises a right in derogation of that of his neighbour, by that neighbour’s implied consent, should adhere substantially to the terms upon which it was given,—especially in a case where the statute make the implication of consent

from user so imperative, and where the temptation to usurpation by the dominant owner is as great as its effects are injurious to the servient proprietor. It seems to me that such a state of the law is most reasonable, and that a man should not be heard to complain of the consequences of an act the necessity for which has been created by himself.

*I am not aware of any existing decision opposed to such a view. *Chandler v. Thompson*, 3 Campb. 80, was much relied [*313 on. If it decides nothing more than that, the excess there being severable, the obstruction ought to have been confined to it, the case may well stand. If it decides more, then it has been overruled by *Renshaw v. Bean* and *Hutchinson v. Copestake*: see the remarks of Kindersley, V. C., in *Wilson v. Townend*, 1 Drewry & Smale 324. The same observation is applicable to *Cottrell v. Griffiths*, 4 Esp. 69. As to *Thomas v. Thomas*, the report of it in 5 Tyrwh. 804 shows that the observation of Alderson, B., was not applicable to the present case: and the casual expression attributed to the Lord Chief Baron, to be found in the judgment in *Cawkwell v. Russell*, 26 Law J., Exch. 46, is clearly extrajudicial: nor is the case itself to be found in the contemporary reports.

The judgment in *Renshaw v. Bean*, after disclaiming the intention to decide "that the plaintiff by the alteration of his windows had entirely lost the right which he had before enjoyed," does certainly go on to say, that, in consequence of his own acts, he "must be considered to lose the former right which he had, at all events until he shall, by himself doing away with the excess, and restoring his windows to their former state, throw upon the defendant the necessity of so arranging his building as not to interfere with the admitted right." But that this passage cannot have been intended as the expression of an opinion that a restoration of the plaintiff's windows to their former state would oblige the defendant to take down the building he had rightfully erected, is evident, not only from the improbability of the Court deciding a point not necessarily involved in the case before it, but likewise from the explanation given in the latter part of the judgment of this very passage; where, after deciding that, the acts of the *defendant were a defence upon a traverse of the right, it proceeds to give the reason as follows,— "for, as we have already [*314 observed in the outset, the plaintiff has by his own acts of excess at all events suspended and lost for the time his former right, if he has not actually and wholly destroyed it." It is not, perhaps, easy to see how the right can be lost even for a time, unless it be actually and wholly destroyed.

Then, what are the circumstances of the present case, with reference to the authorities? When the plaintiff became the owner of No. 107, it was a public-house three stories high, with one window in each story. He raises it two stories, changing the levels of the floors to suit the adjoining warehouse, of which he makes it part, enlarging some windows, adding others, and more than doubling the quantity of light. He makes this entire change in the character of the building and lights with the intention of so enjoying them. Not only does he do no act indicating at the time an intention to resume the old state of things; but all his acts negative any such intention. All

through the correspondence, he never hints at any intention to restore the former state of things, but, on the contrary, insists on his right to maintain the state of things as altered: and it is not until nearly three months after the completion of the defendant's building, that, in pursuance of the advice of counsel, he restores his windows to a state manifestly inadequate to the permanent lighting of the building in the altered form in which he still retains it: and he then calls upon the defendant to pull down the building which *ex concessis* he has rightfully erected.

I am unable to discover any principle of jurisprudence upon which the defendant can be made to do so, consistently with the foundation of the plaintiff's right being that which the authorities state it to be. *315] If the law allowed the defendant to resist the usurpation by an action, then the principle upon which a restoration of the former state of things might preserve the right is sufficiently obvious: but the difficulty is, to see how a rightful act of ownership by the defendant on his own land can be rendered illegal by the act of the plaintiff, to which he is no party. If that effect is to follow, within what time must it take place? For how long does the plaintiff possess the right of restoration so as to have this effect? And, is the time to run from the alteration in the plaintiff's windows, or from the time of the building on the defendant's land? If the restoration is partial, is the demolition to be so likewise? Or, suppose (what in the present case is highly probable) that the plaintiff, having compelled the defendant to take down his building, then reopened the windows,—is the defendant to build another wall, or is he to submit to the usurpation? These and many other difficulties which might be suggested oppose themselves to the maintenance of the plaintiff's claim on the present occasion,—a claim which, if established, will, as it appears to me, simply enable a dominant owner, by a dexterous use of the decision, to increase the servitude upon his neighbour's land to any extent he pleases.

In my opinion, the defendant is entitled to the judgment of the Court.

BYLES, J.—I am also of opinion that the defendant is entitled to the judgment of the Court.

The plaintiff having altered the dimensions, shape, and position of nearly all his windows, it became necessary for the defendant, in order to escape the burthen of a new servitude, to block all the plaintiff's windows to the extent to which he has blocked them. That he had a *316] right to do so while the new lights were open, I believe we are all agreed. The remaining question is, whether the defendant has a right to continue his obstruction after the plaintiff has restored his windows to their original condition.

In order to determine this question in favour of the defendant, it is not necessary to decide that the whole original right was by the common law subject to an implied condition that no part of it should be varied in its exercise to the prejudice of the servient owner, and that, if its exercise be so varied, the whole original right is forfeited or abandoned for ever. I hesitate to arrive at this conclusion on a point of such general and vital importance in great cities like this metropolis, but desire here to express no opinion upon it. It is, I think, sufficient

to say, that, in the case under consideration, the defendant at the time he built did no unlawful act; and the plaintiff, both by his conduct and by his letters, represented to the defendant, and induced the defendant reasonably to believe, that he (the plaintiff) intended permanently to continue his lights in their altered condition; in which condition a permanent erection by the defendant would never become a legal injury to the plaintiff. It will be observed that the plaintiff rebuilds his house in a substantial manner, probably calculated to last a century or more, with a general arrangement internally and externally adapted to the new lights, and unfitted for the old lights. This appears to me equivalent to a representation by the plaintiff to the defendant to this effect.—“I have permanently substituted new lights for my old ones; and, if you do not permanently block the new lights, I shall eventually establish over your property a new servitude.” The written correspondence between the parties before the defendant's erections were complete carries the defendant's case further; for, although the plaintiff disputes the *defendant's right [*317 to block the new lights (in which controversy we are all agreed that the plaintiff was wrong), yet he nowhere informs the defendant that he the plaintiff is about to abolish his new lights, and to restore his ancient ones, but, on the contrary, asserts his right to the new ones. The defendant, therefore, both by the words and actions of the plaintiff, has been encouraged and induced to lay out a sum of money in erecting a permanent building on his own ground: and it would be inequitable if the plaintiff after this should be allowed to say,—“I have at length altered my mind. Now, therefore, pull your building down.” Whatever time is to be allowed to the dominant owner to change his mind, it surely cannot extend beyond the period at which the servient owner has completed a substantial building on the faith of the continuance of permanent buildings already erected by the dominant owner. If it can extend beyond that period, what reasonable limit can be assigned to the caprice of the dominant owner?

I do not rest the defendant's case on the ground of *license*, as in *Liggins v. Inge*, 7 Bingh. 682 (E. C. L. R. vol. 20), 5 M. & P. 712, but on the ground of a representation by the plaintiff of a state of facts which if correct would justify the defendant in expending money in erecting substantial buildings on his own land.

The case bears a strong analogy to those cases of constructive fraud in equity, where an owner of land, without any evil intention, induces or allows another to build or expend money on that land, under the mistaken supposition that it is his own land. But the case before the Court is stronger in two respects than that case; for, here the defendant's use of his own ground was strictly lawful at the time when he built; and the representation here is partly of facts which are true and partly of intentions lying in the exclusive *knowledge [*318 of the plaintiff; so that no inquiry by the defendant could possibly have improved his knowledge or bettered his condition.

But this conclusion in favour of the defendant seems to me fortified by the authorities. If, instead of a frontage containing new lights, the plaintiff had built a blank wall with no lights therein, evincing thereby that he did not intend to resume his easement, and the defendant had accordingly built on his own land as he has done, then

the case of *Moore v. Rawson*, 4 B. & C. 332 (E. C. L. R. vol. 10), 5 D. & R. 234 (E. C. L. R. vol. 16), shows that the plaintiff's easement is gone. It seems to me that the case before the Court is the same in principle with the case of *Moore v. Rawson*.

It does not follow that the plaintiff's reinstatement of his premises would have been the same, if the defendant, instead of erecting a substantial brick structure for his own purposes, had merely put up a temporary hoard to shelter himself from the threatened servitude, and for no other purpose, which hoard might have been both erected and taken down at scarcely any expense. In such a case, the hoard is purposely so erected that it may be removed as soon as the danger is over. The dominant owner violates no law by opening new windows, and the blind of the servient owner, as soon as the new windows are removed, has effectually accomplished all that the servient owner intended. That is a case in which the servient owner suffers no injury.

WILLIAMS, J.—In this case I agree on both points with the judgment of my Lord, which he has allowed me to read. As to the first point, the authorities have established the doctrine, so as to be indisputable unless in a court of error, that, where the owner of the dominant tenement has exceeded the limits of his *admitted right *319] to the access of light and air, either by enlarging or altering an ancient window or opening an additional one, and has thereby put himself into such a position that the excess cannot be obstructed by the owner of the servient tenement, without at the same time obstructing the admitted right, no action can be maintained for the latter obstruction; because it was unavoidably caused by the exercise of the right of the owner of the servient tenement to obstruct the excess, if he shall think fit to incur the trouble and expense of thus using his own land. And these grounds would, I think, afford a good plea by way of justification in an action for the obstruction of the admitted right.

But, secondly, I am of opinion, that, as the owner of the dominant tenement has done away with the excess by restoring his lights to their former state, so that the need to obstruct the excess ceases, the justification of the obstruction of the admitted right also ceases. And the circumstance of the defendant having chosen, in order to secure the more convenient enjoyment of his property, to incur the expense of erecting the obstruction, does not in my opinion justify him in continuing it. The act of the plaintiff in opening the new windows which led to the erection was a legal act, of which the defendant had no legal right whatever to complain. Nor can it be said that the obstruction was erected with the license or assent, express or implied, of the plaintiff. It was erected plainly against his will, and in spite of his wishes.

For these reasons, I think the plaintiff is entitled to our judgment.

ERLE, C. J.—In this case, these were the material facts:—The plaintiff, having a right to an old window opposite the defendant's premises, *320] opened new windows *in a line above it, and finished his alterations in August, 1857. The defendant during September and October, 1857, built at considerable expense a wall and warehouse high enough to obstruct the new windows, and, in so doing, neces-

sarily obstructed the old window,—the wall and warehouse being a convenient mode of obstructing the new windows. The plaintiff, in February, 1858, stopped up the new windows, and restored his premises to their former state, and required the defendant to take away the obstruction to the old window. During these operations the correspondence showed that the plaintiff had no intention either to abandon any right or to grant a license to the defendant to continue his building. The defendant refused to remove the obstruction; and, in an action upon such refusal, the question has been, whether, under these circumstances, the continuance of the obstruction is lawful.

Upon the first point,—whether the obstruction of the old window was originally lawful,—my answer is in the affirmative, upon the authority of *Renshaw v. Bean*, 18 Q. B. 112 (E. C. L. R. vol. 18), and *Hutchinson v. Copestake*, 9 C. B. N. S. 863 (E. C. L. R. vol. 99). But, upon the second point,—whether the continuance of the obstruction was lawful after the premises of the plaintiff had been restored to their former condition,—my answer is in the negative.

The new light in the plaintiff's tenement would, if continued, have imposed a new servitude on the defendant's tenement. This the defendant had a right to prevent by obstruction, obstruction being the only method of prevention known to the law. But, when the cause which made the obstruction lawful was removed in the time and manner above stated, it seems to me that the lawfulness of the obstruction ceased also.

The defendant contended that the opening of new windows, under the circumstances above stated, was *either in the nature of an abandonment of the right in respect of the old window, or was [*321 in the nature of a license to the defendant to build without regard to any former easement, and so was a restoration of full dominion to the defendant freed from the former servitude.

The answer is, that the acts of the plaintiff show an intention the reverse of abandoning any existing right to light, as his endeavour was to obtain an increase. His acts and the correspondence entirely negative any intention either of abandoning, or of licensing, or of freeing the defendant's tenement from servitude: and, if he had no such intention, the cases of *Moore v. Rawson*, 3 B. & C. 340 (E. C. L. R. vol. 10), 5 D. & R. 234 (E. C. L. R. vol. 16), and *Liggins v. Inge*, 7 Bingham 682 (E. C. L. R. vol. 20), 5 M. & P. 712, have no application, seeing that they were founded upon the presumed intention of the plaintiff, in the first case, of abandoning his easements permanently, and, in the second, of granting a license to the defendant.

The defendant contended further, that the right to the passage of light over the land of another must be regarded as if it was derived from a grant on condition that it should be lost if the grantee made an attempt by encroachment to acquire a right to an increase of light, in such a manner that a permanent structure obstructing both the privileged and the unprivileged lights became the convenient mode of preventing the acquisition of a right to the increase. But no authority has been cited to show that a right to light is presumed by law to rest upon a grant conditioned to be void if an attempt to encroach should be made. The right is often created by grant, as, where two adjoining houses pass to separate grantees from the same grantor,

either in fee or for a less estate. If the forfeiture of the light so granted resulted from an enlargement of an old or the addition of a new *window, the opportunity for enforcing such a forfeiture *322] must often have occurred; but no trace of a claim thereto has been found. Moreover, the right to a light is frequently derived under the statute from twenty years' user: but in that statute there is no recognition of a liability to forfeiture if an attempt to increase the servitude should be made. Still, although no authority has been found, the defendant contends that this principle is a necessary consequence of the doctrine established by the late cases of *Renshaw v. Bean* and *Hutchinson v. Copestake*: and, to maintain this contention, he relies on considerations of convenience. He argues, that, if the plaintiff gave occasion for a permanent obstruction by an attempt to impose a servitude on the defendant, he ought not to have the option of rendering, by an arbitrary act, an expensive permanent obstruction which was lawfully made, unlawful and a cause of action, the restoration of his own premises being a matter which rested entirely on his own will, unconnected with any communication with the defendant; and, if the action lies, not only is the expense of the defendant in building thrown away, but he is also made liable to damages.

There is great weight in this argument: but it seems to me that there is greater weight in the answer. The plaintiff, in opening a new window, does a lawful act: and the defendant, if he chooses to obstruct it, also does a lawful act. The new window is entirely unconnected with the casement belonging to the old window; and the defendant is only excused for obstructing the old window if he cannot otherwise obstruct the new window. The obstruction can be effected, for the most part, by a temporary block, at slight expense: and, if the right of obstructing the old window is limited to the necessity of obstructing *323] the new window, it is in its nature a temporary *justification of that which would otherwise be an actionable wrong; and the defendant would act at his peril, if he chose, with such a limited right, to be at great expense for a permanent structure. There is a hardship in allowing to the plaintiff an option of rendering an act of ownership by the defendant, which was perfectly lawful when it was done, unlawful by a change which the plaintiff chooses to make in his own premises. But there seems a greater hardship in making a new window in an upper story a forfeiture for ever of a right to light for the windows below it. The new window may be made under a belief of right; as, where two houses are held under long leases from the same landlord, who gives his consent to an alteration in the windows of one house: this would make the alteration lawful against every one except the tenant of the adjoining house for the residue of his term: see *Davis v. Marshall*, M. T. 1861: or, where the houses are so far apart that it is doubtful whether the new window in the dominant tenement is an increase of the servitude of the servient tenement: see *Binckes v. Pash*, post, p. 324. So, if the new light is only a slight inconvenience, the matter may be expected to be compromised. The hardship of depriving a house of accustomed light, possibly to such an extent as to render it useless as a house, by reason of an act intended to be lawful, is greater than that of throwing the expense of the obstruction on the party obstructing.

The facts and dates here indicate both that the plaintiff believed that he had a right to the new window and also that the defendant believed he had a right to obstruct both the old and the new windows. Their respective rights were at the time doubtful, and have since been settled only so far as *Hutchinson v. Copestake* is decisive.

In conclusion, it may be observed that the hardship *in cases like the present would be prevented if an action was allowed [*324 by the servient tenant against the dominant tenant, either to try the right to a new window, or to recover from the dominant tenant the expenses reasonably incurred in protecting his tenement from the attempted encroachment.

For these reasons, I think that the verdict for the plaintiff should stand. Judgment accordingly.(a)

(a) The verdict was entered for the plaintiff, in order to enable the parties to take the opinion of the Court of error.

In the recent treatise of Professor Washburne (1863) upon "Easements and Servitudes," he says (p. 498), "it will be found, it is believed, that in New York, Massachusetts, South Carolina, Maine, Maryland, Pennsylvania, and Connecticut, the doctrine of gain- ing a prescriptive right to light and air by mere length of enjoyment, has been discarded; while the English rule, in this respect, is retained in Illinois, New Jersey, and Louisiana, and rather recognised and waived than approved in Alabama."

BINCKES v. PASH. Nov. 16.

Where the owner of the dominant tenement has exceeded the limits of the right which he has acquired to the access of light and air, by opening an additional window, leaving his ancient windows unaltered, he has not necessarily lost or suspended his admitted right: but the opening of the additional window justifies the owner of the servient tenement in obstructing the ancient windows if the doing so is unavoidable in the exercise of his right to obstruct the new window.

THE plaintiff was a pianoforte maker carrying on business in Cornbury Place, Old Kent Road; his premises consisting of a building containing two floors,—the lower having five windows, and being used as a workshop,—the upper floor having four windows and a door, and being used as a warehouse or showroom. The defendant was a boot and shoe manufacturer carrying on business on premises adjoining those of the plaintiff. In or about the month of August, 1860, the defendant commenced building a workshop on a spot at the rear of his own premises and abutting on the plaintiff's premises, at the distance of about ten feet from the plaintiff's workshop and showroom. The plaintiff, conceiving that the defendant's building would darken his windows, took proceedings in Chancery for the purpose of enjoining him from proceeding therewith so as to obstruct his (the plaintiff's) lights. Pursuant to an order of Kindersley, V. C., the present action was brought to try the right at law, the proceedings in equity being in the mean time suspended.

*The declaration was in the ordinary form, for an obstruction [*325

of ancient lights. The defendant pleaded not guilty and a denial of the plaintiff's right to the lights, whereupon issue was joined.

The cause was tried before Erle, C. J., at the sittings in London after Hilary Term, 1861. The contest between the parties was, whether the defendant's building did obstruct the plaintiff's windows to such a degree as would sustain the action; and upon the plea raising that question the jury found for the plaintiff. Upon the second plea, denying the plaintiff's right to the light, the verdict was also entered for the plaintiff, with leave to the defendant to move to reverse it, if, upon the undisputed facts, and upon inspection of the model of the premises produced, the Court should be of opinion that the right was disproved.

The facts were in substance as follows:—The windows on the ground-floor had existed in their present state for more than twenty years before action brought, and the jury found that three of those windows were obstructed by the defendant's erection. It appeared that the plaintiff had about ten years before the action so altered and enlarged the windows of the first floor as that an obstruction of the new parts of those windows would have been lawful: and it was apparent from the model, that, at the distance of ten feet, no obstruction of the new part could have been effectual which did not also obstruct both the old parts of the same windows and also the windows of the ground-floor which were found to have been obstructed, and that a structure effective to obstruct the unprivileged parts of the upper windows must, according to the laws of nature, have obstructed the lower windows to a greater extent than the building complained of. It further appeared that the defendant's building did not obstruct *326] any part of the upper windows, though the shade of it reached them for a short time during some days in the year, and that the defendant in erecting his building had no intention of obstructing the plaintiff's lights; but that, on the contrary, he insisted that it neither did nor could obstruct any of them.

The alterations which the plaintiff had made consisted in the enlargement of the four upper windows by widening them about six inches and lengthening them by three courses of bricks, and making a new window in the centre where there had formerly been a door. The lower windows were unaltered, save that one of them had been somewhat diminished in size.

Parry, Serjt., in Easter Term last, pursuant to the leave reserved to him at the trial, obtained a rule nisi to enter a nonsuit, "on the ground that the plaintiff was not entitled to the light, and not entitled to complain of the defendant's act, or of the diminution of light thereby occasioned,"—referring to *Blanchard v. Bridges*, 4 Ad. & E. 176 (E. C. L. R. vol. 31), 5 N. & M. 567 (E. C. L. R. vol. 36), and *Renshaw v. Bean*, 18 Q. B. 112 (E. C. L. R. vol. 83). He also moved on affidavits of surprise: but, as to this, the learned Serjeant, on the rule coming on for argument, admitted that he was answered.

Bovill, Q. C., and *C. Pollock*, showed cause.—The plaintiff's complaint at the trial was of an obstruction to three of the windows on the ground-floor. It was conceded that there was no obstruction to the other two windows on that floor; nor was there any complaint of the obstruction of the upper windows. [ERLE, C. J.—The

plaintiff has altered his upper windows. The defendant's building does not seriously obstruct those windows: but, if he succeeds in this case, upon the principle laid down in *Renshaw v. Bean*, *he will probably build up higher.] That which the defendant has done is not in exercise of any supposed right of obstructing the upper windows. [BYLES, J.—The obstruction of part (perhaps the whole) of the upper windows would have been justifiable.] As to part, that is conceded: but, as to the whole, that is still debatable ground.(a) The point which was decided in *Renshaw v. Bean* does not arise here: the plaintiff has not obstructed, nor has he attempted to obstruct, the upper windows. [BYLES, J.—There is no evidence upon my Lord's notes that the plaintiff could not obstruct the upper windows without also obstructing the lower ones.] None. The question is whether a man, by enlarging in a small degree the area of his upper windows, loses his right to lower windows. In *Renshaw v. Bean*, some of the windows had been enlarged: all had been altered in position; no one remaining as it originally existed: and it was found as a fact that the defendant could not exercise his right of obstructing the unprivileged parts without at the same time obstructing the parts which were privileged. Such also was the case in *Hutchinson v. Copestake*, 8 C. B. N. S. 107 (E. C. L. R. vol. 98); in error, 9 C. B. N. S. 863 (E. C. L. R. vol. 99). According to the view taken by Kindersley, V. C., in *Cooper v. Hubbuck*, 7 Jurist, N. S. 457, the question in these cases is, whether the alteration is a material one or not. In *Chandler v. Thompson*, 3 Campb. 80, Le Blanc, J., laid it down that, if an ancient window be raised and enlarged, the owner of the adjoining land cannot lawfully obstruct the passage of light and air to any part of the space occupied by the ancient window, although a greater portion of light and air be admitted through the unobstructed part of the enlarged window *than was anciently enjoyed: and that doctrine was distinctly approved of in *Blanchard v. Bridges*, 4 Ad. & E. 176 (E. C. L. R. vol. 31), 5 N. & M. 567 (E. C. L. R. vol. 36). *Luttrell's Case*, 4 Co. Rep. 86 a, *Aldred's Case*, 9 Co. Rep. 55 b, *Yard v. Ford*, 2 Wms. Saund. 172, and *Thomas v. Thomas*, 2 C. M. & R. 34,† were also referred to.

Parry, Serjt., *T. Jones*, and *W. W. Cooper*, in support of the rule.—The principle established in *Renshaw v. Bean*, 18 Q. B. 112, and affirmed by the Exchequer Chamber in *Hutchinson v. Copestake*, 9 C. B. N. S. 863 (E. C. L. R. vol. 99), is this, that if the owner of the dominant tenement by opening new windows or enlarging ancient windows imposes an additional burthen upon the owner of the servient tenement, the latter may lawfully obstruct the whole both new and old, provided the former cannot be obstructed without also obstructing the latter. The evidence showed that all the upper windows here were more or less obscured by the defendant's building. [WILLIAMS, J.—The defendant had no intention to obstruct those windows.] Intention is immaterial. [ERLE, C. J.—If the usurpation deprives the dominant tenant of all right, your argument avails. The plaintiff does not complain of the obscuration of the upper windows.] The question is, not what the plaintiff complains of, but what the defendant had a right to do. The authorities show that he clearly had a

(a) *Jones v. Tapling*, ante, p. 283, had been argued but not decided at this time.

right to obstruct every window the obstruction of which was necessary to enable him to reach the usurped lights. It is contended on the part of the plaintiff that the mere act of *enlarging* old windows does not entitle the owner of the servient tenement to obstruct. The whole current of the authorities, however, is opposed to that contention. Any addition to the whole lights destroys the right as much as if the *329] old aperture were entirely closed and a new *and different one substituted for it. In *Blanchard v. Bridges*, 4 Ad. & E. 176 (E. C. L. R. vol. 31), 5 N. & M. 567 (E. C. L. R. vol. 36), E., being owner of a house, enlarged it, and inserted a window at one end in the part added, and at another end carried out the side walls, between which two windows formerly stood, in a straight line, five feet, converting this end into a bow, and inserting two bow windows in the same direction, but not in the same situation, as the two former: and it was held that, whatever privilege against the obstruction of light the windows of the original house possessed, this privilege did not apply to the three new windows. Patteson, J., in delivering the judgment of the Court, there says: "In whatever way precisely the right to enjoy the unobstructed access of light and air from adjoining land may be acquired (a question of admitted nicety), still the act of the owner of such land, from which the right flows, must have reference to the state of things at the time when it is supposed to have taken place; and, as the act of the one is inferred from the enjoyment of the other owner, it must in reason be measured by that enjoyment. The consent, therefore, cannot fairly be extended beyond the access of light and air through *the same aperture* (or one of the same dimensions and in the same position) *which existed at the time when such consent is supposed to have been given.*" It appears to us that convenience and justice both require this limitation: if it were once admitted that a new window, varying in size, elevation, or position, might be substituted for an old one, without the consent of the owner of the adjoining land, it would be necessary to submit to juries questions of degree, often of a very uncertain nature, and upon very unsatisfactory evidence. And in the same case, a party who had acquiesced in the existence of a window of a given size, elevation, or position, because *330] it was felt to *be no annoyance to him, might be thereby concluded as to some other window, to which he might have the greatest objection, and to which he would never have assented if it had come in question in the first instance." [ERLE, C. J.—That was not the case of a mere enlargement of old windows.] No. But it was impossible here to block up or obstruct the new portions without also obstructing the old portions. [ERLE, C. J.—It is not an unimportant element in the consideration of this case, that the plaintiff's building is ten feet distant from the new building of the defendant. BYLES, J.—No case has yet decided that the mere casting a shade across a window gives a cause of action, nor that a man can prescribe for sunlight to enable him to perform delicate work.] In *Garritt v. Sharp*, 3 Ad. & E. 325, 330 (E. C. L. R. vol. 30), 4 N. & M. 834, Lord Denman says expressly that "a party may so alter the mode in which he has been permitted to enjoy this kind of easement as to lose the right altogether." Suppose, instead of merely enlarging the windows on the upper floor of his building, the plaintiff had erected an entirely

new story with new windows therein, how could the defendant have exercised his undoubted right to obstruct those new lights otherwise than by building upwards from the foundation on his own land, and so intercepting the light to the plaintiff's lower windows? The plaintiff is a wrongdoer in attempting to impose upon the defendant a larger easement than he was entitled to. Vice-Chancellor Kindersley seems in *Wilson v. Townend*, 1 Drewry & Smale 324, to have doubted the propriety of the decision of the Court of Queen's Bench in *Renshaw v. Bean*, 18 Q. B. 112 (E. C. L. R. vol. 83): but, in the subsequent case of *Turner v. Spooner*, 4 Law Times, N. S. 732, he appears to have come to a different conclusion. There, B., possessed of ancient lights, substituted new window-frames, *with single plate-glass panes, opening internally, for [331 the old ones, consisting of small panes with lead frames, opening only partially: in consequence of this alteration, more light and air were let in, although the apertures were not increased: C., whose premises were adjoining, objected to this alteration, on the ground that it was a new easement, and interfered with the privacy of his premises: he proceeded to erect a framework, glazed with opaque colored glass, within a few inches of B.'s ancient lights: B. thereupon applied for an injunction: and it was held, that, if a party possesses ancient lights, and, without enlarging the apertures, can acquire an increased degree of light and air, he is entitled to such acquirement without giving a right to the occupier of the servient tenement to say there is a new easement; but that, *if he increases the dimensions of the apertures, the occupier of the servient tenement has a right to object, and if, in asserting his right, he interferes with the passage of light and air, he is justified in doing so.* The Vice-Chancellor, in giving judgment, says: "It is perfectly true, that, if a party having ancient lights alters the position of those lights, or if he put into the same wall of his house additional lights, or if he materially increases the dimensions of his own lights, that in the one case would be a new easement, and in the other an additional easement, provided it was not interfered with for twenty years; and that gives the owner of the servient tenement a right to say, 'I must prevent you acquiring that easement by twenty years' enjoyment;' and it would enable him at all events to intercept in any way that he thought fit the passage of light and air to the new windows, or to the increased portion of the windows: and it is further established, that, if he cannot do that without at the same time interfering with the passage of light and air to the old portion, he *is justified in doing so." That is exactly the principle now [332 contended for on the part of the defendant: and the same principle is adopted and acted upon by the Court of Exchequer, in the case of a drain, in *Cawkwell v. Russell*, 26 Law J., Exch. 84. "Where," says Pollock, C. B., "a party has a limited right of this kind, and exercises that limited right in excess, so as to produce a nuisance, the only remedy, and the only way whereby the party can protect himself, is by stopping the whole, as was done in a case (a) deciding (though it is hardly necessary to cite a decision on the point; it is so very clear and plain on the good sense of the matter that it hardly wants an authority), that, if a man has a limited right to the

(a) Referring to *Renshaw v. Bean*, 18 Q. B. 112.

use of a window, and he enlarges it considerably, the only way in which the person who is annoyed by the enlargement of the window can prevent that nuisance, is, by erecting a barrier and stopping the whole up." And Alderson, B., says: "If a man has a right to send clean water through my drain, and chooses to send dirty water, every particle of the water ought to be stopped, because it is all dirty." In ancient times, it was held that a man lost his estate by attempting to enlarge or extend it. Thus, where a tenant for life made a feoffment, and so put the remainder-man to his writ of formedon, he forfeited his life estate. So, where a tenant for life or for years made a tortious conveyance, in order to give a new quality to his estate, such tortious conveyance operated a forfeiture of the estate to which he was really entitled. That rule is applicable to easements, as well as to corporeal hereditaments.

*333] *Bovill*, Q. C., submitted that the rule, so far as it *related to the prayer for a new trial upon the affidavits, should at all events be discharged *with costs*.

T. Jones, contra, objected that the Court had no power to do this.

ERLE, C. J.—If we have the power to do what Mr. *Bovill* asks, I for one should feel very much inclined to do it. At all events, if our decision should ultimately be in favour of the defendant, we may direct the master to tax the costs of that part of the rule for the plaintiff.

Cur. adv. vult.

KEATING, J.—This was an action for obstructing the plaintiff's lights. The pleas were, not guilty, and a denial of the plaintiff's right to the lights. The building of the plaintiff was two stories high, with a range of windows in each story: those on the ground floor were ancient unaltered windows: those on the second floor had about ten years before been altered, not in number, but in size, by adding, as the plaintiff alleged, a very small additional space or strip on two sides of each window. The defendant built a shop on the opposite side of a passage ten feet wide, which, as he contended, did not affect the light passing to any of the defendant's windows. This was the point contested at the trial.

The jury found for the plaintiff on not guilty, but found nothing on the second issue, except that the model was correct. The verdict was entered for the plaintiff upon that issue; and the question is whether we can, without any other finding by the jury, set aside that verdict, and enter a verdict for the defendant, upon the ground that the right of the plaintiff to the enjoyment of light through all his *334] windows was *suspended or lost by his alteration of those in the second story.

Assuming it to be established by the authorities (as in my opinion it is) that a person who has acquired a right to the enjoyment of light by user may so alter the mode of such enjoyment by a change in the windows admitting the light, in their size, shape, or number, and with or without an alteration in the character of the building in which they are placed, as to lose the right previously acquired, yet it is difficult to define the precise amount of alteration which will have that effect. It would be scarcely reasonable that a trifling alteration in the mode of enjoyment, whereby no injury is done to the servient tenement, should forfeit the whole right: *Hall v. Swift*, 4 N. C. 381 (E. C. L. R.

vol. 33), 6 Scott 167: whilst, on the other hand, such a material alteration as in *Garritt v. Sharp*, 3 Ad. & E. 325 (E. C. L. R. vol. 30), 4 N. & M. 834, or in *Jones v. Tapling*, *antè*, p. 283, would in my opinion forfeit the right, as being a total violation of the conditions upon which alone that right rested. If, therefore, the jury had found in this case that the alteration in the upper windows of the plaintiff's building was material, and that the unprivileged light could not be obstructed without also obstructing that which otherwise would be privileged, then I should have been of opinion, upon the authority of *Renshaw v. Bean*, 18 Q. B. 112 (E. C. L. R. vol. 83), and the other authorities I have referred to in *Jones v. Tapling*, that the plaintiff had lost his right to complain of the obstruction in question, and that our judgment should be for the defendant: but I am unable to say, merely looking at the model, that such is the case. There was, as I understand, no evidence given upon that point at the trial, the defendant resting his case entirely upon the fact of non-obstruction: and it may be, if that question had been contested before the jury, *they would have found the addition to the windows to be so [*335 small as not to vary in any essential degree the mode of enjoyment. At all events, the leave reserved extending only to an inspection of the model, I am not satisfied by such inspection that the state of things clearly existed that would, upon the authorities referred to, cause a forfeiture of the plaintiff's right.

I agree, therefore, that the rule to enter a verdict for the defendant upon the traverse of the right should be discharged.

BYLES, J.—I am of opinion that the plaintiff is entitled to the judgment of the Court. I think that the plaintiff's ancient unaltered window has not lost its right, except in a contingency which has not yet happened. The easement belonging to that window is no doubt liable to be suspended, or in course of time destroyed, when the servient owner necessarily blocks it, in order to prevent a servitude in favour of other and new lights which cannot possibly be blocked without blocking this ancient light also. The servient owner has not yet done this. He has not only not proceeded to raise his new building to such a height as to block the new lights; but, on the contrary, he has roofed in and finished his new building without doing so. Perhaps he never will do so.

It is said that the servient owner has done no more than he has a right to do, because he might have legally done even more than he has done. The true mode of answering this objection is, I conceive, to distinguish between the absolute right to block the ancient window and the conditional right dependent on another enterprise which has not yet been undertaken by the defendant, and perhaps never will be.

Not to observe this distinction would be to sacrifice the ancient right of the dominant owner where the only *reason for the sacrifice has not yet come into existence, and peradventure [*336 never may.

WILLIAMS, J.—In this case, I am of opinion that the plaintiff is entitled to our judgment.

The real question appears to me to be, whether, if the owner of the dominant tenement has exceeded the limits of the right he has acquired to the access of light and air, by opening an additional win-

dow, leaving his ancient windows unaltered, he has lost or suspended his admitted right, or whether the opening of the additional window merely justifies the owner of the servient tenement in obstructing the ancient windows if the doing so is unavoidable in the exercise of his right to obstruct the new window. If the former is the right view, I think the defendant is entitled to our judgment, because the right has ceased to exist on which the action is founded. If the latter, then the plaintiff is entitled to maintain his action, because the defendant has not chosen to exercise his right of obstructing the new windows, and has therefore never been under the necessity of obstructing the ancient window in the exercise of that right.

On the part of the defendant, it was argued that this point was expressly decided in the case of *Renshaw v. Bean*, 18 Q. B. 112 (K. C. L. R. vol. 83); and that, as a Court of co-ordinate jurisdiction, we are bound by that decision. But I think the present case distinguishable, on the ground that, in *Renshaw v. Bean*, the windows the right in which was held to be suspended, if not lost, had been so much altered that they could not properly be regarded as the same windows as those in respect of which the right had been gained; so that, in truth, the ancient windows, and the right claimed in respect of them, might well be regarded as having ceased to exist.

*337] But, in the present case, the privileged windows remain unchanged, and the right acquired in respect of them must also remain, unless it has been in some legal way forfeited, or lost, or suspended.

I beg to adopt the reasoning of my Lord in his judgment in *Jones v. Tapling*, ante, p. 283, as affording in my opinion unanswerable grounds for contending that there has been no such forfeiture or loss or suspension.

ERLE, C. J.—In this case the declaration was for an obstruction of light. The pleas were,—first, not guilty,—and, secondly, a denial of the right to the light.

At the trial, the contest was, whether the building of the defendant did obstruct to such a degree as would sustain the action; and, upon the plea raising that question, the verdict was for the plaintiff; and that verdict is to stand. On the second plea, denying the plaintiff's right to the light, the verdict was entered for the plaintiff, with liberty to the defendant to move to reverse it, if, upon the undisputed facts, and upon inspection of the model of the premises produced, the Court should be of opinion that the right was disproved.

It appeared that the windows on the ground-floor had existed in their present state more than twenty years before action brought; and the jury found that those windows were obstructed by a building of the defendant, erected at the distance of ten feet therefrom. It further appeared that the plaintiff had about ten years before the action so altered and enlarged the windows of the first floor as that an obstruction of the new parts of those windows would have been lawful: and I see from the model, that, at the distance of ten feet, no obstruction
*338] of the new part *could have been effectual which did not also obstruct both the old parts of the same windows, and also the windows of the ground-floor, which are found to have been obstructed; and that a structure effective to obstruct the unprivileged parts of the

upper windows must, according to the laws of nature, have obstructed the lower windows to a greater extent than the building complained of. It further appeared that the defendant's building did not obstruct any part of the upper windows, though the shade of it reached them for a short time during some days in the year; and that the defendant had not the remotest intention of exercising any right of obstruction in erecting his building: on the contrary, he maintained that it neither did nor could obstruct any window at all.

These are the material facts upon which the question is raised whether the right of the plaintiff to the light of the lower windows is disproved.

I take it to be clear from the cases of *Blanchard v. Bridges*, 4 Ad. & E. 176 (E. C. L. R. vol. 31), 5 N. & M. 567 (E. C. L. R. vol. 36), *Renshaw v. Bean*, 18 Q. B. 112 (E. C. L. R. vol. 83), and *Hutchinson v. Copestake*, 9 C. B. N. S. 863 (E. C. L. R. vol. 99), that the right of the plaintiff in respect of his privileged windows was suspended by reason of his taking light through the apertures in part unprivileged, and thereby attempting to increase the servitude to which the defendant's premises were subject.

The plea denying the right of the plaintiff was held to be proved in *Renshaw v. Bean*: and the defendant contended that the defence in that case did not rest upon an excuse for an act of the defendant *primâ facie* unlawful, but upon a loss of right by the plaintiff in consequence of the encroachment attempted by him. If so, it would follow, that, if a wall of a certain height is necessary to obstruct a new window, and if, in the course of erection, before it is sufficiently high for the new window, it obstructs an old window, the servient *tenant would have a defence against an action for that ob- [*339 struction, not on the ground that he was obstructing the new window, and so was justified in respect of the old window, which he could not conveniently avoid obstructing, but because the plaintiff's right would be gone for the time.

The attempted encroachment of the dominant tenant, according to the cases above cited, would, if this be correct, restore to the servient tenant dominion over his tenement freed from servitude, to the extent reasonably necessary for obstructing the encroachment.

In the present case, the obstruction complained of might be enlarged, and might so become a part of an entire structure lawful because it obstructed an encroachment, and, in so doing, necessarily obstructed a lawful easement. Then, does it become a wrong, and a cause of action, because it was done for another purpose, in the belief that, at the distance of ten feet it could not operate as an obstruction at all, and in its present state does not obstruct the upper windows at all? This the defendant would answer in the negative, because, if the plaintiff's encroachment operates to effect a loss of right in him, and a restoration of right to the defendant, whatever the defendant does within the limit of the right so restored to him is justified thereby, although he may have been ignorant of his right, and had no intention of exercising it.

But, in my opinion, this argument of the defendant is not entitled to succeed. The whole of it rests on the assumption that the plaintiff's right to the easement for the privileged windows is lost by reason of the opening of the unprivileged windows; which assumption is

founded on the judgment in *Renshaw v. Bean*, that the verdict should be entered for the defendant on the plea denying the plaintiff's right to the light. That case may be distinguished from this, on the *340] *ground pointed out by my Brother Williams, viz., that there no ancient window was left in its original state: every window had been altered: and, if the alteration rendered it impossible to separate the privileged part from the unprivileged, the right might be suspended or lost. But, where an ancient window continues in its original state, the opening of a new window does not directly affect the right to the ancient window. A case might be put where each story in the same house belonged to a separate owner: and it could not be maintained that an encroachment by a tenant of the upper story destroyed the rights of the tenants of the lower stories to their ancient lights. Also, the doctrine of forfeiting ancient lights by opening new lights does not seem to me supported by authority, nor by public convenience, as explained by me more fully in *Jones v. Tapling*, ante, p. 283.

I therefore come to the conclusion that the right to build so as to obstruct a new window, and, in so doing, if necessary, obstructing an old window, is only matter of justification for what would otherwise be a wrong; and that it is essential for the support of this justification to show that the obstruction was raised for the purpose of obstructing the new window, and, in effecting that purpose, unavoidably obstructed the ancient window also.

The facts of this case do not sustain that justification: and it follows that the plaintiff is entitled to keep the verdict found for him on the plea denying his right, and that this rule must be discharged.

Rule discharged.

*341] *DICKINSON and Others v. STIDOLPH.(a) Nov. 2.

In order that an unattested paper may be adopted as part of a duly attested will, it must be referred to by the will in such a manner as shall, with the assistance of parol evidence when necessary and properly admissible, leave no doubt of its identity.

Where a codicil refers to two memorandums, and only one is found, effect must be given to that which is found,—for, either the ordinary presumption must prevail, that the missing paper was destroyed by the testatrix *animo revocandi*, or the principle must be applied that the apparent testamentary intentions of a testator are not to be disappointed, merely because he made other dispositions of his property which are unknown by reason of the testamentary paper which contained them not being forthcoming.

Operation of a duly attested codicil, though it relate only to personal estate, as a republication of the will, so as to pass lands purchased between the dates of the will and codicil.

Effect of alteration, and obliterations made by the testator.

THIS was an action of ejectment brought by the direction of the Court of Chancery to recover possession of three undivided fourth parts or shares of and in certain freehold messuages, lands, and premises situate in the city of London and county of Middlesex respectively.

(a) The plaintiffs were "James Dickinson, William Stourton and Sarah Sophia Ann his wife, William Lambert and Harriett his wife, William Farr Stourton an infant by the said William Stourton his guardian, and George William Dickinson."

The defendant was the tenant in possession at the time of the commencement of the action, and defended for the whole of the lands and premises; and, in pursuance of a Judge's order that the trial of the cause should take place in Middlesex, the cause came on to be tried before Erle, C. J., at the sittings for Middlesex after Easter Term, 1860, when, by the direction of his Lordship, a verdict was found for the claimants, with liberty for the defendant to move that the verdict for the claimants should be set aside and a verdict entered for the defendant.

In Trinity Term, 1860, a rule was accordingly obtained by the defendant; and in the same term the claimants by their counsel appeared to show cause, when it was ordered, by consent of the parties, that the following case should be stated for the opinion of the Court:—

*John Whitehead, before and at the time of the making of his will hereinafter mentioned, and thenceforth continuously [*342 until his death, was seised in fee simple of the reversion of and in the said lands and premises expectant on the determination of the estates for life of Ann Whitehead, Mary Whitehead, Charlotte Whitehead, and Caroline Whitehead, respectively, and the survivors and survivor of them, such reversion being liable to be divested by the survivor of them leaving any child of her body living at her death.

The said John Whitehead by his will, dated the 3d of November, 1817, and duly executed and attested, devised the said reversion unto his wife Hester Mary Whitehead, her heirs and assigns; and the said John Whitehead died so seised of the said reversion on or about the 6th of March, 1819, without having revoked his said will, and leaving his said wife Hester Mary Whitehead him surviving.

Nine testamentary papers, copies of which were set out in the bill in Chancery which accompanied the case, were admitted to probate in common form in Doctors' Commons on the 28th of April, 1823, as the will and codicils of the said Hester Mary Whitehead. Printed fac simile copies of these several documents with the alterations, obliterations, interlineations, and errors of grammar and orthography were used on the argument, and were as follows,—the *italics* representing the parts which in the originals were obliterated, and the words within brackets denoting the interlineations,—

“Alpha Cottage, Regent Park,

(No. 3.)

“August 27th, 1819.

“I give and bequeath the freehold property I have at Tunbridge and the money I may have in the bank at my death to be equally to be divied between my sisters Mrs. Ibbott, Mrs. Dickeson, Mary Dickenson, James Dickenson, daughter and son of Joseph and [*343 *Charlotte Dickeson, and Sarah Ibbott and Joseph Ibbott, the property to be sold and to be divied between them equally share and share alike. I hear by appoint Mrs. Sarah Ibbott my sole executrix to this my last will revoking all former wills excepting two memorandums dated 10 May, 1819, which are to remain in force with this my last will.

“H. M. WHITEHEAD.”

“Witness, JAMES FISHER.

“CAROLINE FISHER.

“FRANCES WELLER.”

"I make this codicil to my will the property that I had left to my brother William Hamlim Stidolph I revoke and desire the share of my property that was left to him may be equally divided between George Dickenson, James Dickenson, Mary Dickenson, and Mrs. Sarah Ibbott and Mrs. Dickenson my sisters and *that my front drawing-room clock be sold and the money to be divided as above that they share and share a like.*"

(No. 1.)

"Alpha Cottages Regent Park *May* 10 [Nover 16] 1819. As the state of my mind owing to the irretrievable loss of my ever beloved husband and since his death the cruel treatment of my brother for no cause whatever his conduct has added very much to my distracted mind therefore I leave what property I may die possess of after my just debts are paid I desire I may be buried by the side of my ever beloved husband by Mr. Fisher 61 Green Street I desire my property may be devided James Dickinson, George Mary Dickenson Joseph and Sarah [Ibbott] *William and Henry Ladd Ibbott the children of my two sisters to be equally divied between them share and share a like every thing* *344] *to be sold and turned in to money except the *things here after mentioned* Know one of the above to receive their part till they have reached the age of 21,—James Dickenson to continue his schooling till the age of 14,—and the money to be paid jointly by those that are to share my property I give my piano to Mary Dickenson and after her death to her brother James and so on to the next heir *I give to my dear old friend my diamond butterfly* Mrs. Marks wife of James Marks coach maker *New Road and after her death to Mrs. Ibbott my oldest sister the large [diamond] butterfly I give Mrs. Ibbott my gold watch chain and seal* *I give Mrs. Varnham wife of Mr. Charles Varnham my front drawing-room clock and my back to drawing clock to Mary Dickenson and to James Dickenson at the age of 21 my beloved husbands watch as it is* *I do desire the above James Mary [George] Dickenson and Joseph and Henry Ladd and William Ibbett will pay jointly and quarterly and every one of them part of what I may die possess of twelve pounds a year to my good and faithful servant Frances Weller during her life* *I give also to her the bed she sleeps on and the furniture in the same room and likewise all the furniture in the kitchen except the clock [for her good conduct]* *I give that to James Dickenson my jewels plate furniture clothes picture except those I leave to my friends to be all sold and the p money to be equally devied between Mrs. Ibbott and Mrs. Dickenson [and Charlotte Mary Dickenson] and their children glass and china I give to Maria wife [of James Fisher] Green Street my work box and to Mrs. Sarah my work table to Caroline Fisher.*

' Witness,
"JAMES FISHER.

"Witness my hand this day
"May 10, 1819,
"HESTER MARY WHITEHEAD.
"November 16, 1819."(a)

*345] *(No. 2.) "17 Alpha Cottage
"November 16, 1819.

"I Hester Mary Whitehead do hereby make this codicil to my will the money I had left in my will and property to Francis Weller my servant I revoke and desire the same may be equally divided between the persons in my former will in consequence of her *ungratefeful* [un-

(a) This paper was endorsed "Hester Mary Whitehead's will."

gratefull] conduct since my lamentable situation. I do declare this to be my wish.

"H. M. WHITEHEAD."

"I give and bequeath to Mary Charlotte Dickinson my Indea shawl and my bed and furniture that is in my room and likewise my drawing [room] furniture—and to James Dickenson my parlor furniture in my parlor and my bed and furniture in my back bed-room and my watch and chain and seals to Mary C. Dickenson I do desire that Mary Dickenson James and George Dickenson Sarah Ibbott Ibbott do *jointly* jointly pay quarterly to Charlotte Dickenson wife of Joseph Dickenson twenty pounds per year during her natural life and ten pounds a year to Sarah Dickenson [daughter of the above] during her life to be paid by the above jointly my clothes I beg may be equally divided between Mrs. Ibbott Mary Charlotte Dickenson and Sarah Ibbott daughter of Joseph Ibbott the pictures of my beloved husband *I desire* and myself two in oil to be given to Mary Charlotte Dickenson and the two in crayons to Sarah Ibbott daughters of Joseph Dickenson and Joseph Ibbott my plate to be equally divided between Mary Charlotte Dickenson and James Dickenson and Sarah Ibbott son and daughters of Joseph Dickenson and Joseph Ibbott—the other pictures to be divided between the above my rings and jewels to be divided between the above table linen the same—I *give one of my [*346 silver cups one to Mary Charlotte [Dickenson] and one to Sarah Ibbott my books and book case t in the little back drawing-room I give to Mary Charlotte Dickenson and the two in the parlor one I give to James Dickenson with the books that has the secretary and the other to Joseph Ibbott—son of Joseph Ibbott with books—if any of the above should die I desire the survivors will share and share alike.

November 16, 1819.

"HESTER MARY WHITEHEAD."

(No. 5.)

"Alpha Cottage, Feb. 19, 1821.

"This is a codicil to my will I desire that the lease of my house Alpha Cottage with furniture plate linen jewels watches pictures books clocks with all the property that belongs to me after my death with the [Bank in the five per cents—with the money in the] freehold houses at Tunbridge to my ever valuede friend during his natural life Doctor George Rees Doctor of Physic late of Finsbury Square now of Pembrok House Mare Street Hackney Member of the Royal College of Physicians for his benefit only (no creditor whatsoever can or shall have any control over my property but to be solely for his) the said George Rees comfort during his life and after his death to go to the persons mention in my will in the hands of Mr. Fisher Green Street. I do peremptorily beg this will may revoke all other will's during the natural life of the said Doctor George Rees, as he has been the most valuable and sincere friend to me during my severe trial of widow hood I beg he would see all my just debts paid out of my property if there should be any which will not be more than a few pound as I never contracted any—the money in the Bank he is to receive the interest during his life—and to pay to *Charlotte Dickenson wife [*347 of Joseph Dickenson sister to H. M. Whitehead thirty pounds per year during her life }
to be paid to her quarterly. "Witness my hand
"H. M. WHITEHEAD

"S. FYNNEY.

"H. RICHARDSON.

"GEO. AUTHER."

"February 19, 1821.

(No. 6.)

"September 28, 1822.

"This is A Codicil to my Will in the hands of my Dear friend Dr. George Rees I do desire that the interest of One thousand pounds standing in my name in the four pr. cents. to be solely for the use and benefit of my sister Charlotte Dickinson and at her death the same to be equally devied between her son James Dickinson and Sarah Ibbott only daughter of my sister Sarah Ibbott share and share alike I give and bequeath to my Dear friend Mary Ann Storey 12 Mount Street Grosvenor Square my small diamond ring the one that is set as a butterfly and my diamond ear-rings I likewise give to Mrs. Giblin Aunt to the above and my Black velvet dress and cloak and the best bonnet I may leave, I give and bequeath to my ever dear friend Harriott Vardon Daughter of Mr. Vardon Kingston my gold watch chain and seals with my large Diamond ring. I give to my ever to be beloved Dr. George Rees my large Amethyst diamond brooch. I likewise give to Harriott Vardon my tortoise shell worke Box—and my worke table to Sarah Ibbott as above—I give to Harriott Vardon my Blacke lace Cloak and large white vail and the two picture of my beloved husband and myself hanging in the Back drawingroom I beg that the remainder of my cloths may be *eaqually* equally divided between my Sister Sarah Ibbott Charlotte Dickenson *348] and Sarah *Ibbott daughter of the above Sarah and I do desire if at my Death that if Ann Mirries is in my house she may receive additional to the wagees ten pounds and five pounds for Mourning for her faithful services. I give to Mrs. George Author my small diamond ring.

"I do declare this to be my own act and deed.

"HESTER MARY WHITEHEAD."

"I give and bequeath to Miss Eliza Attree my coral necklace & bracelets she lives at St. James Place and to Miss Sarah Ibbott my India Shawl.

"HESTER MARY WHITEHEAD.

"Witness, MARY ANN LEADER.

"J. DEXTER."

(No. 7.)

"Finding that owing to the late insolvency of my friend Dr. Rees the disposition I have made of my property in my codicil dated February 19th 1821 will not secure the property there left to him as I [wish I] make this Codicil to vary the codicil dated the 19th Feby. 1821 in as much as the property thereby left to Dr. George Rees I now leave to [Mr. Norton Apothecary Gloster St. Gloster Place and] Mr. *Henry How* Cole Carpet Warehouse Regent Street in trust to pay to Dr. Rees the interest and proceeds as the same shall arise for his sole and separate use but upon this express condition that the same or any part thereof shall not be subject or liable either as principal or Interest to be sold disposed of made over or applied in liquidation of any debts or Engagements heretofore contracted or wh. may hereafter be contracted by the said Dr. George Rees but the same shall not be assignable by operation of law or otherwise to warrant or empower the Trustees hereby named to apply the sd. Trust Property in any way *349] other than is hereby directed and I *appoint Mr. James White of No. 3 Judd St. London my sole Executor.

"H. M. WHITEHEAD.

"Signed and acknowledged by Mrs. Whitehead in the presence of us who in her presence and the presence of each other have hereunto set our names as witnesses this eleventh day of December, 1822.

"MARY ANN LEADER.

"J. DEXTER.

"BENJ. ROLEFF.(a)

No evidence was given at the trial to explain or account for the said alterations, obliterations, and interlineations, or any of them, or to show that any of the said papers had ever been in the possession of Mr. Fisher mentioned in the sixth of the said papers, or whether there ever had been any testamentary papers of the said Hester Mary Whitehead, except the said nine papers.

With the said testamentary papers another paper, properly signed and attested, but not admitted to probate, was deposited in Doctors' Commons and marked 6 a. It has no interlineations, and is as follows:—

"Alpha Cottage Feby 19, 1821.

"This is a Codicil to my Will I desire that the Lease of my House Alpha Cottage with furniture plate linen jewels watches pictures Books Clocks with all the property that belongs to me after my Death with the freehold Houses at Tunbridge with the money I may have in the Bank in the five per Cents To my *ever Valued friend During his natural life Doctor George Rees Doctor of Physic late of Finsbury Square now of Pembroke House Mare Street Hackney Member of the Royal College of Physicians for his benefit only) no creditor whatsoever can or shall have any control over my property but to be solely for his the said George Rees comfort during his life) And after his Death to go to the persons mention in my will in the hands of Mr. Fisher Green Street I do peremptorily beg this Will may revoke all other Wills during the natural life of the said Doctor George Rees—As he has been the most valuable and sincere friend to me during my severe trial of widowhood I beg he would see all my just debts Paid out of my property if there should be any—which will not be more than a few Pounds as I never contracted any the money in the bank he is to receive the interest only during his life—and to pay to Charlotte Dickenson the wife of Joseph Dickenson Sister to H. M. Whitehead thirty pounds per year during her life to be paid to her quarterly.

"Witness my hand.

"H. M. WHITEHEAD.

"SARAH FYNNEY

H. RICHARDSON

"GEO. AUTHER."

"February 19, 1821.

"I have this day, February 11, 1823, delivered a copy of the above to Doctor George Rees in the presence of Mrs. Sarah Ibbott and Mrs. Charlotte Dickenson, as witness my hand. "JAMES WHITE."(a)

(a) This paper was endorsed "Codicil assigns to Mr. Norton in Trust, 1822."

(b) This was the executor named in the testamentary paper No. 9; and the delivery in question took place two days after the death of the testatrix.

The said several testamentary papers were produced from Doctors' Commons: and the learned Judge *directed the jury to find, *351] and the jury found, that the same were respectively signed and executed by the said Hester Mary Whitehead, and attested: but the Court was to be at liberty to draw such inferences of fact as the jury might have drawn.

The said Hester Mary Whitehead was at the dates of the said testamentary papers, and continuously to the time of her death, seised in fee simple of and in the said reversion so devised to her as aforesaid: and, save and except the said estates for life of the said Ann Whitehead, Mary Whitehead, Charlotte Whitehead, and Caroline Whitehead, the said estate and interest of the said Hester Mary Whitehead was not nor is subject to any outstanding estate, term, or interest in the same.

The said Hester Mary Whitehead died on the 9th of February, 1823.

The said Charlotte Whitehead survived the said Ann Whitehead, Mary Whitehead, and Caroline Whitehead, and died without issue on the 9th of April, 1848.

The said claimant James Dickinson is the same James Dickinson mentioned in the first, second, and third of the said testamentary papers.

The said claimant George William Dickinson is the heir at law of the George Dickinson mentioned in the second and third of the said papers; and the said George Dickinson was the heir at law of the Mrs. Dickinson mentioned in the first, second, and sixth of the said testamentary papers.

The said claimants Harriett Lambert and William Farr Stourton are the devisees in fee under the will of Joseph John Ibbott, mentioned as Joseph Ibbott in the first and third of the said testamentary papers; and the said Joseph John Ibbott was the heir at law of the Mrs. Ibbott mentioned as Mrs. Ibbott and as Mrs. Sarah Ibbott, the *352] sole executrix, in the first of the *said testamentary documents, and as Mrs. Sarah Ibbott in the second of the said testamentary documents.

The said claimant Sarah Sophia Ann Stourton is the same person as Sarah Ibbott mentioned in the first and third of the said testamentary papers.

Mary Dickinson mentioned in the first, second, and third of the said papers is now the wife of Richard Mansell, and is not represented by any of the plaintiffs in the present action.

The defendant David William Stidolph is the heir at law of William Hamlin Stidolph, who is mentioned in the second of the said testamentary documents, and who was the brother and heir at law of the testatrix, Hester Mary Whitehead.

The Court was to be at liberty to draw such inferences as a jury might reasonably have drawn; and, if they should think fit, to inspect the original testamentary papers.

The questions for the opinion of the Court were,—

First, whether the said testamentary papers, or any of them, were admissible in evidence.

Secondly,—if the said papers, or any of them, were admissible in

evidence,—whether the claimants or any of them, and, if any, which of them, are entitled to recover the three undivided fourth parts or shares, or any parts or shares, and, if so, what parts or shares, of the lands and premises in question: And, if the Court shall be of opinion that the claimants or any or either of them are or is entitled to recover the said three undivided fourth parts or shares, or any parts or shares of the lands and premises, then judgment is to be entered for the said claimants for such parts or shares as they may be entitled to. But, if the Court shall be of opinion that the claimants or any of them are not entitled to any part or share, then judgment is to be entered generally for the defendant.

*The case was argued in Trinity Term last, by *Couch* (with whom was *Clare*), for the plaintiffs, and *Bovill*, Q. C. (with whom were *Hardy* and *Macnamara*), for the defendant. The arguments are so fully commented upon in the judgment that it has been deemed superfluous to state them at length. [*353]

On the part of the plaintiffs the following authorities were referred to:—*Allen v. Maddock*, 11 Moore's P. C. Cas. 427, *Smart v. Prujean*, 6 Ves. 560, *Habergham v. Vincent*, 2 Ves. jun. 228, *Shortrede v. Cheek*, 1 Ad. & E. 57 (E. C. L. R. vol. 28), 3 N. & M. 866, *Re Hunt*, 2 Rob. E. C. 622, *Hodges v. Horsfall*, 1 Russ. & M. 116, *Pigott v. Wilder*, 26 Beavan 90, *Gordon v. Lord Reay*, 5 Simons 274, *Larkins v. Larkins*, 3 B. & P. 16, *Locke v. James*, 11 M. & W. 901,† *Short d. Gastrell v. Smith*, 4 East 418, *Gover v. Davis*, 9 Weekly Rep. 87, *Noel v. Hoy*, 5 Madd. 38, *Thomas v. Phelps*, 4 Russ. 348, *Doe d. Wall v. Langlands*, 14 East 370, *Davenport v. Coltman*, 9 M. & W. 481,† *Patton v. Randall*, 1 Jac. & W. 189, *Saumarez v. Saumarez*, 4 Milne & Cr. 331, *Re Greenwich Hospital Improvement Act*, 20 Beavan 458, *Phillips v. Beal*, 25 Beavan 25, *Morrison v. Hoppe*, 4 De Gex & Sm. 234, *Jarman on Wills*, 3d edit. 112, 599, and *Williams on Executors*, 5th edit. 85, 123, 124.

On the part of the defendant the following authorities were cited:—*The Corporation of Gloucester v. Osborn*, 1 House of Lords Cases 272, *Smart v. Prujean*, 6 Ves. 560, *Dillon v. Harris*, 4 Bligh, N. S. 321, *Ferraris v. Lord Hertford*, 3 Curteis 468, 7 Jurist 263, *Croker v. Lord Hertford*, 4 Moore's P. C. Cas. 339, *Re Drummond's Will*, 2 L. T. N. S. 391, *Swete v. Pidsley*, 6 Notes of Cases in the Ecclesiastical Court 189, *Maxwell v. Maxwell*, 2 De Gex, M'N. & G. 705, *Wentworth v. Cox*, 6 Madd. 363, *Camfield v. Gilbert*, *3 East 516, *Doe d. Dring*, 2 M. & Selw. 448, *Coard v. Hick v. Holderness*, 20 [*354] *Beavan* 147, *Saunderson v. Dobson*, 16 Law J., Exch. 249, *Williams v. Ashton*, 1 Johnston & H. 115.

WILLIAMS, J., referred to *Goodright d. Rolfe v. Harwood*, Cowp. 87, 3 Wils. 497, and *Ingoldby v. Ingoldby*, 4 Notes of Cases in the Ecclesiastical Court 493,—a series of reports the discontinuance of which he lamented as a great loss to the profession. *Cur. adv. vult.*

WILLIAMS, J., now delivered the judgment of the Court: (a)—

In this case the plaintiffs claim three undivided fourth parts of some houses and lands in London and Middlesex, as devisees under an alleged will of *Hester Whitehead*; and we have to decide whether, among the testamentary papers made by her and produced before us, there is a will operating to pass that property.

(a) The case was argued before *Erie*, C. J., *Williams*, J., *Willes*, J., and *Byles*, J.

It appears that the testatrix became entitled to the houses and lands in question under the will of her husband, who died in March, 1819. The property bequeathed to her by his will consisted of personalty and realty. The personalty was probably known by the testatrix before May, 1819; but there is no evidence either that she knew of any realty at all till August, 1819, or that she knew of the property now in question at any time, as it consisted of the reversion expectant on the decease of the four tenants for life, liable to be divested by the survivor of these leaving any issue, *and it did not fall into possession until many years after her death.

We find, that, on the 10th of May, 1819, she executed a testamentary paper attested by one witness only, which is the document numbered 3 in the list of fac simile copies of testamentary documents produced. It begins by a recital which shows that she felt much aggrieved by what she regarded as the cruel treatment of her brother (who was her heir at law) since her husband's death, and then gives *all the property of which she may die possessed* (except certain specific legacies, and an annuity to a servant), to be divided amongst her nephews and nieces, seven in number, three being children of her sister Mrs. Dickinson, and four being children of her sister Mrs. Ibbott.

If there had been three witnesses to this document, the cases collected in Jarman on Wills, 8d edit. Ch. 22, show that it contains words sufficient to pass all the real and personal estate to the parties therein named.

The tenor of this will, however, and the circumstance that it is not sufficiently attested to pass real estate, may indicate that the testatrix understood it to apply to personalty only. Still, the expressions it contains respecting her brother make it plain that she wished to exclude him from her real property, if she had any. But there is no evidence that at this date she was aware she had any realty which he could inherit from her.

On the 27th of August, 1819, she made a will, numbered 1 in the list before mentioned, attested by three witnesses, and devising some realty at Tonbridge and the money she might have in the bank at her death to her sisters and to their children named in the testamentary document of the 10th of May, omitting one of the children of her sister Mrs. Dickinson and two of the children of her sister Mrs. Ibbott.

By this instrument, *she expressly revoked all former wills, *356] "excepting two memorandums dated 10th May, 1819, which are to remain in force with this my last will."

Upon the discussion, the cardinal question has been whether this clause referred to the testamentary paper above mentioned dated 10th of May, 1819, and incorporated it with the will of the 27th of August, 1819. And this question we answer in the affirmative.

The testatrix refers to two memorandums. The context shows that she refers to a testamentary paper; for, they are to remain in force with her will, and, as no other testamentary paper made by her of that date has been found, we consider this to be sufficiently identified as one of those to which she refers. It is signed by her; it has the specified date; and it constitutes the disposition of her residuary estate, which is wanting in the will of August, 1819. If in the

interval between the making of the two papers she had discovered her right to the land at Tonbridge and the Bank Stock, and her general intent to exclude her brother from succeeding to any of her property and to prefer her other relations continued, the two instruments taken together would carry that intention into effect.

Several objections were made to this construction. First, that the reference is to "two memorandums," and the paper of the 10th of May is not well described as a "memorandum." But we see no weight in this objection. The instrument, though it apparently purports to dispose of all the property of the testatrix, does not, like the paper of August the 27th, formally style itself "her last will," and does not appoint any executor. We think, therefore, the executrix may well have adverted to it as a "memorandum."

We are desirous of adding, that, by the opinion we *have expressed on this point, we do not at all intend to infringe, but [*357 only to apply the rule of law which we consider to be established by *Smart v. Prujean*, 6 Ves. 560, and many other subsequent cases, viz. that, in order that an unattested paper may be adopted as part of a duly attested will, it must be referred to by the will in such a manner as shall, with the assistance of parol evidence when necessary and properly admissible, leave no doubt of its identity.

Secondly, it was objected that the testatrix refers to two memorandums, and only one is found. But, if she intended to adopt two instruments, and only one is found, the law requires that effect should be given to that which is found: for, either the ordinary presumption must prevail, that the missing paper was destroyed by the testatrix *animo revocandi*, or the principle must be applied that the apparent testamentary intentions of a testator are not to be disappointed merely because she made other dispositions of her property which are unknown by reason of the testamentary paper which contained them not being forthcoming. It is on this principle that a subsequent will is no revocation of a former one, if the contents of the subsequent will are unknown. And the law is the same even if the later will be expressly found to be different from the former, provided it be unknown in what the difference consists: *Hitchins v. Basset*, 3 Mod. 203, 2 Salk. 592, Show. P. C. 146; *Goodright d. Rolfe v. Harwood*, 3 Wils. 497, 2 W. Bl. 937, Cowp. 87, 7 Bro. P. C. 344.

Thirdly, it was objected, that, if one of the memorandums referred to was the instrument of the 10th of May, that instrument was intended to be confined to personalty only, and therefore a reference to it willing that it should remain in force with that her last will, left it still to operate on the personalty only: and *reliance was placed on the cases of *Wentworth v. Cox*, 6 Madd. 363, and *Maxwell v. Maxwell*, 2 De Gex, M'N. & G. 105, as establishing the rule that a testator by a general gift of all his property ought to be deemed to have intended to pass only such estate as the nature of the instrument is capable of passing. And it was accordingly contended, that, as the paper of May the 10th, 1819, was not attested so as to be capable of passing real estate, the general words contained in it could only have been intended to extend to personalty. But it appears to us that the principle of these cases does not apply here. The intent is apparent to exclude the brother from all property, by including all in the gift

to the sisters' children. The expressions more appropriate to personalty than realty are consistent with that intent, if only personal estate was known by the testatrix; and the form of attestation would be accounted for by the same fact.

But, if she afterwards discovered that she had real property, and disposed of that which she knew of by a specific devise, and incorporated a will applicable in expression to all property real and personal, but limited to personalty by reason of the attestation, such incorporation of the former will with the will duly attested would make both instruments one will, and all her expressions in each become expressions in a will duly attested to pass real property.

The form of the incorporation,—that the memorandum is to remain in force with that her last will,—might mean that it should have no different effect by reason of the reference thereto and incorporation thereof in the will. But we consider the apparent intention of excluding her brother to be strongly opposed to this construction of the words of reference. If she knew of no other realty but that at Tonbridge, the form would be accounted for, and, being a will of *359] *personalty only*, it might be called a "memorandum," as compared with a will effective for all property, and it might be supposed by the testatrix to apply to personalty, because she knew of no realty; still, if her words are wide enough to include all property, and her apparent intention includes all property, we ought to give effect to the words of the will in their ordinary sense, and make them include all the property to which they in that sense extend, whether that property was known to the testatrix or not.

If the words of reference are some indication of intending a narrower sense, this indication is not sufficiently strong to induce us to alter the effect of the words of the instrument, and construe them according to the words of reference rather than according to their ordinary meaning.

We think, then, that none of these objections ought to prevent us from coming to the conclusion that the reference in the will of August the 27th (No. 1) incorporates the testamentary paper of May 10, 1819 (No. 8), and makes the two instruments one will.

The cases which have occurred with respect to the effect of a codicil in republishing a will of realty, appear to support the principle that the effect of such incorporation is, to make it the duty of the Court to construe the two instruments in the same way, and to allow the same operation to the language of the incorporated instrument as if it had been originally contained in the will which incorporates it. *Barnes v. Crow*, 1 Ves. jun. 486, is the leading case of the series of decisions which established the rule that a duly attested codicil, *though it related only to personal estate*, would operate as a republication of the will so as to pass lands purchased between the dates of the will and codicil. "The effect of these authorities," said Lord Ellenborough, in *Good-* *360] *title v. Meredith*, 2 M. & Selw. 5, "is, to give an operation to the codicil per se and *independently of any intention*, so as to bring down the will to the date of the codicil, making the will speak as of that date, unless, indeed, a contrary intention be shown, in which case it will repel that effect."

Assuming, however, that the two instruments as they existed at the

time of the making of the will of August 27th, 1819, might be regarded as forming one duly executed will, and might be so construed, it was further contended on the part of the defendant that the paper of the 10th of May was revoked by the obliterations and alterations which were subsequently made on the face of it by the testatrix.

It is unnecessary for us to consider what effect these acts, coupled with the testamentary documents dated the 16th of November, 1819 (and numbered 4 and 5 in the list of fac simile copies), ought to have on the bequests of personal estate contained in the paper of May 10, 1819 (No. 3). It is enough to say, that, with respect to the devise of the realty, which, for the purposes of this part of the argument, it must be deemed to contain, the obliterations and alterations did not operate as a revocation. Even if they are to be regarded as final and absolute, and not as deliberative or dependent alterations, they would only operate to produce an intestacy pro tanto (which would not affect the result of this action) as to the shares of those devisees whose names are struck out, and not as a revocation of the whole instrument. But we incline to think, applying the doctrine of dependent relative revocations, that they are totally ineffectual as to the bequest of real estate. The case of *Winsor v. Pratt*, 2 B. & B. 650 (E. C. L. R. vol. 6), which was cited by Mr. *Couch* on the argument, is an example of that doctrine; and it is supported by a long line of authorities, on the principle stated by Lord Alvanley in *Ex parte Ilchester*, 7 Ves. 373, that, "where it is evident that the testator, though using the means of revocation, could not intend it for any purpose than to give effect to another disposition, though, if it had been a mere revocation, it would have had effect, yet, the object being only to make way for another disposition, if the instrument cannot have that effect, it shall not be a revocation."

A further argument on the part of the defendant was, that both the papers of the 10th of May and 27th of August, 1819, were revoked by the codicil dated February 19, 1821 (numbered 6 in the list of fac simile documents), by which the testatrix, after giving a life estate in all her property to Dr. G. Rees, wills that, after his decease, her property shall go to the persons mentioned in her will "in the hands of Mr. Fisher, Green Street."

On the part of the plaintiffs, it was argued that this refers to the papers dated 27th August, 1819 (No. 1), and May 10th, 1819 (No. 3). But we agree so far with the counsel for the defendant, that it does not sufficiently appear that these documents were the will to which reference is thus made. But, inasmuch as no testamentary paper is forthcoming which answers the description of "my will in the hands of Mr. Fisher of Green Street," it is proved by the cases of *Hitchins v. Basset* and *Goodright v. Harwood*, to which there has already been occasion to refer, that the mere fact of such a will having been once made, the contents of it being unknown, cannot operate as a revocation of any other will which is found in existence after the death of the testator.

For these reasons, we are of opinion that the claimant James Dickinson in his own right, and the other claimants as representatives of George Dickinson, Joseph Ibbott, and Sarah Ibbott, mentioned in the

*362] testamentary paper of May 10th, 1819, are each of *them respectively entitled to one-seventh of the three undivided fourth parts of the lands and premises in question; and that judgment must be entered accordingly. Judgment for the plaintiffs.

In *Tonnele v. Hall*, 4 Comst. 140, it was held that where a will otherwise properly executed, refers to another paper already written and so describes it as to leave no doubt of its identity, such paper makes part of the will, although the paper be not subscribed or even attached. But where the maker of a deed of gift, handed it to one to hold till it was called for and referred to it in his will thus: "I give and bequeath to my son S. in addition to what I had given him by deed of gift,"—it

was held the reference was not sufficient to incorporate it into the will, and parol evidence was not admissible to show that it was the deed referred to. *Bailey v. Bailey*, 7 Jones' (Law) N. C. 144.

It is text law that a will unmistakably referred to in a codicil, is proved by the proof of the codicil: *Mooers v. White*, 6 J. Ch. 360 (375*); *Haven v. Foster*, 14 Pick. 534; *Duncan v. Duncan*, 23 Ill. 364; *Murray v. Oliver*, 6 Ire. Eq. R. 55.

LIDGETT and Others v. PERRIN and Another. Nov. 18.

Goods were put on board a ship consigned for Calcutta, at 39s. per ton "payable in London :"—Held, that it was for the jury to say from the surrounding circumstances whether the contract was a contract for "freight" contingent on the ship's arrival at her destination, or for a sum payable on the receipt of the goods on board her.

THIS was an action brought in the Sheriffs' Court, London, by a plaintiff issued on the 13th of September, 1860, to recover the sum of 37*l.* 0*s.* 10*d.* for freight and primage of 300 boxes of soap alleged to have been shipped by the defendants on board the Earl of Eglinton, of which the plaintiffs were the charterers, on a voyage from London to Calcutta.

The particulars of demand accompanying the plaintiff were as follows:—

"In the Sheriff's Court, London, &c.

"London, 10th January, 1860.

"Messrs. G. & R. G. Perrin,

"Drs. to freight per ship Earl of Eglinton Captain Wardrop, for Calcutta.

	£	s.	d.
"C. 1/300, 300 boxes, 700 feet, 39s.	34	2	6
Primage	1	14	2

35 16 8

"Interest on 35 <i>l.</i> 16 <i>s.</i> 8 <i>d.</i> from 10th January to 13th September, 247 days, at five per cent. }	1	4	2
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£37 0 10

*563] *The cause was tried before the Judge of the said Court on the 17th of October, 1860, when the plaintiff George Lidgett

was examined as a witness for the plaintiffs; and by direction of the said Judge the plaintiffs had the choice of being nonsuited or taking an adjournment on payment of costs. The plaintiffs elected the latter course, and obtained leave to amend their particulars of demand. The amended particulars delivered on the 9th day of November, 1860, were as follows:—

“In the Sheriff’s Court, London, &c.

“This action is brought to recover 34*l.* 2*s.* 6*d.* freight of 300 boxes, measuring 700 feet, at 39*s.* per ton of 40 feet, per the ship *Earl of Eglinton*, bound from London for Calcutta, and 1*l.* 14*s.* 2*d.* primage: such two sums making together 35*l.* 16*s.* 8*d.*

“The plaintiff will also seek to recover the sum of 35*l.* 16*s.* 8*d.* as money received by the defendants for the plaintiffs’ use.

“And they will also seek to recover the same sum as money due upon accounts stated between the plaintiffs and the defendants.”

On the 14th of November, 1860, the cause came on for hearing upon the amended particulars, when the plaintiffs were nonsuited, subject to the following case:—

The plaintiffs in this action are shipowners and ship brokers carrying on business at Billiter Street, City, as John Lidgett & Sons. The defendants are shipowners and agents, and carry on business at Lime Street, in the City, as G. & R. G. Perrin.

At the end of the year 1859, the plaintiffs chartered the ship *Earl of Eglinton* for a voyage from London to Calcutta. She was put on the berth as a general ship in the usual way, and the plaintiffs advertised for cargo.

On the 5th of January, 1860, the defendant Richard *Goolden [*364 Perrin called upon the plaintiffs. He said he had soap to ship for Calcutta, and inquired what rate of freight the plaintiffs required. After some negotiation, the plaintiffs agreed to take it at 39*s.* per ton of forty feet. The defendant did not disclose the existence of any principal on that occasion. The plaintiffs gave the defendant on that occasion a card, of which the following is a copy:—

“Will meet with quick despatch. For Calcutta direct. The magnificent high-classed British-built ship *Earl of Eglinton*, A. 1. for thirteen years, 1275 tons register. John N. Wardrop, commander. Loading in the London Docks. Has fine accommodation for passengers in her spacious poop. Apply to John Lidgett & Sons, 9 Billiter Street, E. C.”

(Endorsed.) “15 tons boxes soap, 39*s.* per ton of 40 feet; payable here. J. L. & S.”

The memorandum on the back of the said card “payable here” means that the freight was payable in London. Three hundred boxes of soap, containing 700 feet, were ultimately shipped on board the *Earl of Eglinton* under the said contract, which, at 39*s.* per ton of 40 feet would give 34*l.* 2*s.* 6*d.* for the freight of the said soap. The amount of the primage was 1*l.* 14*s.* 2*d.*; making together the sum of 35*l.* 16*s.* 8*d.*, being the amount mentioned in the particulars of demand.

The *Earl of Eglinton* was lost on the voyage in question. The plaintiffs offered evidence to prove, that, by the custom, where the freight was made payable in London, it was payable lost or not lost; but, as the witness George Lidgett admitted on cross-examination that

the captain had signed a bill of lading in respect of the carriage of the said soap, and as the counsel for the plaintiffs were not able to produce *365] the bill of lading or give secondary evidence of its contents, *the Commissioner thought that evidence of the custom was immaterial, and held, that, in the absence of the bill of lading, there must be a nonsuit as to the freight.

The case having been adjourned, George Lidgett, one of the plaintiffs, was further examined, and said,—

“After the sailing of the ship, I called at the defendants’ office, and saw the defendant Richard Goolden Perrin. I applied to him for payment of the freight. He said it was not convenient; that he would have paid it if we had called before, as he had the money in his hands. He asked me to give him two or three weeks. I said, ‘Say how long.’ He said he could not say exactly then. I said I would not wait an indefinite time. I asked when he would pay it. He said he would call on the following Saturday and let me know when he would pay it. I said I had better call on Gray & Co. He said ‘Do not call on Grays; they won’t pay you.’ I said ‘Very well, if you tell me when to call, and will pay at that time, I will not call on them.’ This was in July. He did not keep his appointment on the Saturday,—and, on the same day, I called on Gray & Co., and applied for payment of the freight. I saw the defendant on a subsequent occasion. He said, ‘What have you been saying to Gray about us? You said we were the curse of the trade.’ I said ‘Mr. Gray tells me that he has paid you the money.’ He made no remark as to the money. He said he would call on the Saturday and pay the money. He did not do so. I saw him afterwards at his office. He said ‘I brought you the money once, and you would not have it; and now you will have to wait for it.’ We had declined to allow him to deduct the primage.”

Cross-examined: “I said to him on the first occasion simply that I *366] had come for the freight. I wrote the *following letter of the 21st of August, 1860, to the said Messrs. Gray & Co.:—

“9 Billiter Street, London,
“21st August, 1860.

“Gentlemen,—We have applied without effect to your agents Messrs. Perrin & Co., of Lime Street, for your freight per Earl of Eglinton; and have now to give you notice, that, unless it is paid to us by 12 o’clock to-morrow, we shall apply to the County Court for our remedy. We have waited patiently for a long time; and the writer called yesterday to see you, in the hope of an amicable settlement. We think you should see we get our due in this matter without the trouble of legal proceedings.

“Messrs. Henry Gray & Co.”

“JOHN LIDGETT & SONS.”

The plaintiff George Lidgett also admitted that he had called on Messrs. Gray & Co. upon other occasions; also that the bills of lading were delivered to Messrs. Gray & Co.

James Cannon said: “I am in the plaintiffs’ employment. I called at the defendant’s office and saw him. I asked for the freight on the soap per Earl of Eglinton. He said he was surprised we had not sent for it before. It was all right, and he would send it in. I made the same application a second time, and he said he would send it in.”

Cross-examined: "I cannot tell the month or day that I made either of these applications, and made no memorandum of the replies I obtained."

John Cannon, clerk to the plaintiffs, said: "The defendant came to our office on the 25th of August last, and saw Mr. John Lidgett. I was present at the interview. He said he had called to settle the freight. He produced money. He wished to deduct the primage. The plaintiff would not consent to this, but *said, 'If you'll pay interest from the time the freight was due, I'll allow the [*367 primage.' They parted without anything being done.

Henry Gray,—called by the defendant,—said: "I did not employ defendant as my agent. He called on me and said he heard I had some soap for Calcutta, and he could take it cheaper than I could do it elsewhere. I told him I had soap. He told me the rate of freight per the Earl of Eglinton. I agreed to ship the goods. I saw the plaintiffs after the goods were on board, and asked for the bills of lading in the name of Gray & Co. The plaintiffs told me they could not give me the bills of lading, as they had not been signed by the captain. A day or two afterwards I applied again and obtained them, and they were made out in the name of Gray & Co. The vessel sailed in January, and was lost shortly afterwards, and before reaching her destination. I have since been applied to by the plaintiffs frequently by letter as well as personally for the freight, but have been unable to pay, and have since stopped payment. I have paid the defendants money on a general account, having had many transactions with them from time to time prior and subsequent to the 5th January. There is a balance now due to them. I never gave them any special directions to appropriate any money in payment of freight of the Earl of Eglinton."

Upon this evidence the Commissioner directed a nonsuit; but, to save expense, it was arranged that, if the Court should be of opinion that the nonsuit was right, then judgment was to be entered for the defendants with costs. If it should be of opinion that the nonsuit was wrong, then the Court to direct a verdict for the plaintiffs, with costs, for such amount as it might think fit, or to direct a new trial on such terms as the Court might think fit,—the costs of and incident to this case to abide the event.

**Murphy*, for the plaintiffs.—Though nominally a claim for [*368 freight, the contract in reality was for money payable on the goods being put on board the vessel: *Andrew v. Moorhouse*, 5 Taunt. 435; *Kirchner v. Venus*, 12 Moore's P. C. Cas. 361: at all events, the question should not have been withdrawn from the jury. If the term "freight" was used between the parties in the sense of money to be paid upon receipt of the goods, the contract subsequently reduced into writing (between Gray and the captain) would not be the contract originally entered into. The fact of the captain's signing a bill of lading was not conclusive to show that any contract had ever been reduced into writing. The plaintiff was no party to any such contract. Independently of the parol evidence, it is submitted that the words mean, payable lost or not lost.

Pearce, contra.—The card constituted no contract: it was nothing more than the ordinary information as to the time of the ship's sail-

ing. The words "payable here" mean no more than "Not payable in Calcutta." The delivery of the goods must precede the payment of the freight. The contract was with Gray & Co. The particulars call the sum "freight," and it was always demanded as "freight." [ERLE, C. J.—It was called for as "freight" after it was known that the ship had gone to the bottom. BYLES, J.—It is not an uncommon thing to call this freight.]

ERLE, C. J.—Upon the evidence before the learned Commissioner, there clearly was a question for the jury whether the defendants had entered into a contract for the payment of the stipulated sum whether the vessel arrived or not. I am well aware of the weight to be attached to the contract contained in the bill of lading, and am also *369] willing to give full effect to the *plaintiffs' letter of the 21st of August. But, in point of law, it was perfectly competent to the defendant to bind himself to pay 39s. per ton for the goods on their being put on board. He might have owed Gray & Co. the money; or he might have hired a portion of the hold of the ship. At all events, it was a question for the jury, and the learned Commissioner was bound to leave it to them for decide.

The rest of the Court concurring, Rule absolute for a new trial.

WALLIS v. LITTELL.

The plaintiff declared upon an agreement by the defendant to transfer to him a farm which he (the defendant) held under Lord Sydney, "upon the terms and conditions of the agreement under which the same was held by the defendant under Lord Sydney :"—

Held, that, in support of his claim to damages for a refusal on defendant's part to perform the contract, it was not necessary for the plaintiff to produce the agreement under which the defendant held.

The defendant pleaded that the agreement declared on was made subject to the condition that it should be null and void if Lord Sydney should not within a reasonable time after the making of the agreement consent and agree to the transfer of the farm to the plaintiff :—

Held, that it was competent to the defendant to prove by extraneous evidence this contemporaneous oral agreement,—such oral agreement operating as a suspension of the written agreement, and not in defeasance of it.

THIS was an action for the breach of a contract to transfer a farm.

The declaration in substance stated that the defendant occupied a certain farm under Lord Sydney, and that it was agreed between the plaintiff and defendant that the defendant should transfer the farm to the plaintiff "upon the terms and conditions of the agreement under which the same was held by the defendant under Lord Sydney," and that the plaintiff should have immediate possession, and pay the rent, taxes, and tithes from Michaelmas, 1860, and should pay the sum of *370] 200*l.* for live and dead stock as *enumerated: General averment of performance by the plaintiff of all conditions precedent to be performed on his part: Breach, that the defendant refused to transfer the farm to the plaintiff, or to give him possession thereof.

The defendant, amongst other things, pleaded,—first, non assumpsit, —secondly, a special plea alleging that at the time of the making of the agreement in the declaration mentioned, it was agreed by and between the plaintiff and the defendant, and the said agreement in the declaration mentioned was made subject to the terms and conditions,

that the said agreement should be null and void if the said Lord Sydney should not within a reasonable time after the making of the said agreement consent and agree to the said transfer as in the declaration mentioned; and that Lord Sydney would not within such reasonable time as aforesaid consent or agree to the said transfer, and refused so to do, although often requested by the defendant so to do. Issue thereon.

The cause was tried before Keating, J., at the sittings in London in Trinity Term last. The material facts were as follows:—The defendant occupied a farm under Lord Sydney. Being desirous of giving it up, he entered into an agreement with the plaintiff to transfer his interest in it to him in consideration of the plaintiff's paying him the sum of 200*l.* for the stock, crops, &c. It was known to both parties that the transfer could not be effected without the consent of Lord Sydney: and the defendant swore that he had made it a condition of the agreement that Lord Sydney's consent should be obtained, otherwise the contract was to be null and void.

The plaintiff paid 100*l.* on account, and an agreement was drawn up and signed by the defendant embodying the terms of the bargain, but omitting all mention of Lord Sydney's consent to the transfer. Subsequently the plaintiff, with the knowledge of [371 and without objection by the defendant, sold a cow and a pair of ducks which had formed part of the defendant's stock.

Lord Sydney declining to accept the plaintiff as his tenant, the defendant was unable to carry out the agreement, and offered to return the plaintiff the 100*l.*, which the latter declined to accept, but brought this action.

On the part of the defendant it was objected, that, inasmuch as the declaration alleged the contract to be a contract to transfer the farm upon the terms and conditions of the agreement under which the same was held by the defendant under Lord Sydney, it was essential for the plaintiff, in order to sustain his declaration, to prove the agreement between Lord Sydney and the defendant.

For the plaintiff it was also insisted that the parol evidence as to the agreement or undertaking of the parties that the contract was to be void in the event of Lord Sydney's consent to the transfer not being obtained, was inadmissible to control the written agreement.

Both objections were overruled, leave being reserved to either party to move should it become necessary.

The jury found that there was such an agreement as alleged in the second plea; and accordingly a verdict was entered for the defendant on the second issue, and for the plaintiff on all the others, with 6*l.* damages.

Shee, Serjt., on a former day in this term, obtained a rule nisi to enter a nonsuit, on the ground that the agreement under which the premises mentioned in the declaration were held by the defendant under Lord Sydney was not produced, or for a new trial on [372 the ground that the verdict on the first issue was against the evidence on which the jury found the issue on the second plea for the defendant.

Huddleston, Q. C., also obtained a rule nisi to enter a verdict for the plaintiff on the second issue, pursuant to the leave reserved to him, on the ground that the parol agreement mentioned in the second plea

was inadmissible to vary the written agreement, or for judgment for the plaintiff on the second plea non obstante veredicto, on the ground that the agreement in that plea was not stated to be in writing. He referred to *Adams v. Wordley*, 1 M. & W. 374.†

Huddleston, Q. C., and *Holl*, who appeared to show cause against the first rule, were stopped by the Court.

Shee, Serjt., and *Sharpe*, in support of that rule, contended, upon the authority of *Turner v. Power*, 7 B. & C. 625 (E. C. L. R. vol. 14), 1 M. & R. 135 (E. C. L. R. vol. 17), *Whitford v. Tutin*, 10 Bingh. 394 (E. C. L. R. vol. 25), 4 M. & Scott 166 (E. C. L. R. vol. 30), *Buxton v. Cornish*, 12 M. & W. 426,† and *Strother v. Barr*, 5 Bingh. 136 (E. C. L. R. vol. 15), 2 M. & P. 207, that the agreement under which the defendant held the farm under Lord Sydney having been made an essential part of the contract declared on, its non-production was a ground of nonsuit, inasmuch as the Court and jury had not before them the whole materials for assessing the damages for the alleged breach. [WILLIAMS, J.—The plaintiff does not complain of the breach of any of the terms of the agreement referred to, but that the defendant altogether refused to transfer the farm to him.]

*373] *Shee*, Serjt., and *Sharpe*, then proceeded to show *cause against the second rule.—The defendant is clearly entitled to retain his verdict on the second plea, which in substance alleges that the agreement declared on was made subject to the condition that it should be null and void if Lord Sydney should not within a reasonable time after the making of the agreement consent and agree to the transfer of the defendant's farm to the plaintiff, and that Lord Sydney refused his consent. Both parties were aware that the consent of Lord Sydney was necessary. The proof of that fact was not an attempt to vary in any way the effect of the written contract,—for inasmuch as it related to the transfer of land, it must necessarily have been in writing: it showed that the contract was never to come into operation as a contract at all, unless that condition precedent were complied with. In *Davis v. Jones*, 17 C. B. 625, it was held that parol evidence was admissible to show that a written contract which had no date was not intended to operate from its delivery, but from a future uncertain period: and *Jervis*, C. J., said: "It was perfectly competent to the plaintiff,—the agreement being silent on the subject,—to show by parol testimony that it was not intended to take effect until the happening of something else." And *Crowder*, J., said: "I think it is quite impossible to contend, after the decision in *Murray v. The Earl of Stair*, 2 B. & C. 82 (E. C. L. R. vol. 9), 3 D. & R. 278 (E. C. L. R. vol. 16), that the plaintiff might not show that the agreement, though signed by her, was not to be operative until something else was done. *Morris* proved that it was agreed between himself and the plaintiff at the time that the rent was not to commence until the date was filled in, and that the date was not to be inserted until the completion of the repairs. The evidence was clearly admissible." That case was followed by *Pym v. Campbell*, 6 Ellis & B. 370 (E. C. L. R. vol. 88), *374] where it was held that *evidence was admissible to show that an instrument (in writing) was not intended to operate as an agreement between the parties until a third party had approved of it. It is impossible to distinguish those cases from the present.

Huddleston, Q. C., and Holl, in support of the rule.—The authority of *Davis v. Jones* and *Pym v. Campbell* is not disputed: the only question is whether the matter sought to be introduced by extraneous evidence was a condition precedent or a defeasance. You may always show by parol evidence that an instrument executed between the parties was not meant to operate as an agreement until the happening of a given condition: but you cannot show by parol that the agreement is to be defeated on the happening of a given event. In the two cases relied on, there never was any perfect agreement at all.

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the Court: (a)—

In this case, at the time when the parties made a written agreement to assign a farm, with immediate possession, there was an oral agreement that the written agreement was to be void if Lord Sydney, the landlord, did not consent to the assignment. In an action for not assigning, the pleas were,—first, non assumpsit,—and, secondly, the oral agreement, and that Lord Sydney did not consent. The jury found that Lord Sydney did not consent, and that the oral agreement was made: thereupon, the question has been, whether *the evidence was admissible. If it was, both pleas ought to be found [*375 for the defendant, and there would be no judgment non obstante verdicto on the second plea.

We are of opinion that it was admissible. In *Pym v. Campbell*, 6 Ellis & B. 370 (E. C. L. R. vol. 88), and *Davis v. Jones*, 17 C. B. 625 (E. C. L. R. vol. 84), it was decided that an oral agreement to the same effect as that relied on by the defendant might be admitted, without infringing the rule that a contemporaneous oral agreement is not admissible to vary or contradict a written agreement. It is in analogy with the delivery of a deed as an escrow: it neither varies nor contradicts the writing, but suspends the commencement of the obligation.

It was contended for the plaintiff that the present case could be distinguished from those cited, on the ground that the intention here was that the written agreement should take some effect, but should be liable to be defeated if the event mentioned in the oral agreement happened. The stipulation for immediate possession, and the facts that money was paid by the plaintiff, and a cow sold by the plaintiff, in part execution of the agreement, were relied on to show that the oral agreement was a defeasance merely, and, if so, it would be in contradiction of the written agreement, which was in terms absolute.

But this is a question of fact: and we think there is evidence that the fact is not so. The evidence shows that the defendant introduced the oral agreement for his benefit, and has treated the written agreement as suspended, having always retained possession of his farm. Also the subject-matter of the two agreements is strong to show that the oral suspended the written agreement from the beginning, and was not in defeasance of it; for, the written agreement was to assign, but the possibility of assigning was supposed to *depend on [*376 Lord Sydney's consent; and the oral agreement that the written agreement should be void if he did not consent, is in its nature a condition precedent: the defendant in effect says,—“If I have the power

(a) The case was argued before Erle, C. J., Williams, J., Byles, J., and Keating, J.

to the sisters' children. The expressions more appropriate to personalty than realty are consistent with that intent, if only personal estate was known by the testatrix; and the form of attestation would be accounted for by the same fact.

But, if she afterwards discovered that she had real property, and disposed of that which she knew of by a specific devise, and incorporated a will applicable in expression to all property real and personal, but limited to personalty by reason of the attestation, such incorporation of the former will with the will duly attested would make both instruments one will, and all her expressions in each become expressions in a will duly attested to pass real property.

The form of the incorporation,—that the memorandum is to remain in force with that her last will,—might mean that it should have no different effect by reason of the reference thereto and incorporation thereof in the will. But we consider the apparent intention of excluding her brother to be strongly opposed to this construction of the words of reference. If she knew of no other realty but that at Tonbridge, the form would be accounted for, and, being a will of *359] *personalty only, it might be called a "memorandum," as compared with a will effective for all property, and it might be supposed by the testatrix to apply to personalty, because she knew of no realty; still, if her words are wide enough to include all property, and her apparent intention includes all property, we ought to give effect to the words of the will in their ordinary sense, and make them include all the property to which they in that sense extend, whether that property was known to the testatrix or not.

If the words of reference are some indication of intending a narrower sense, this indication is not sufficiently strong to induce us to alter the effect of the words of the instrument, and construe them according to the words of reference rather than according to their ordinary meaning.

We think, then, that none of these objections ought to prevent us from coming to the conclusion that the reference in the will of August the 27th (No. 1) incorporates the testamentary paper of May 10, 1819 (No. 8), and makes the two instruments one will.

The cases which have occurred with respect to the effect of a codicil in republishing a will of realty, appear to support the principle that the effect of such incorporation is, to make it the duty of the Court to construe the two instruments in the same way, and to allow the same operation to the language of the incorporated instrument as if it had been originally contained in the will which incorporates it. *Barnes v. Crow*, 1 Ves. jun. 486, is the leading case of the series of decisions which established the rule that a duly attested codicil, *though it related only to personal estate*, would operate as a republication of the will so as to pass lands purchased between the dates of the will and codicil. "The effect of these authorities," said Lord Ellenborough, in *Good-* *360] *title v. Meredith*, 2 M. & Selw. 5, *"*is, to give an operation to the codicil per se and independently of any intention, so as to bring down the will to the date of the codicil, making the will speak as of that date, unless, indeed, a contrary intention be shown, in which case it will repel that effect.*"

Assuming, however, that the two instruments as they existed at the

time of the making of the will of August 27th, 1819, might be regarded as forming one duly executed will, and might be so construed, it was further contended on the part of the defendant that the paper of the 10th of May was revoked by the obliterations and alterations which were subsequently made on the face of it by the testatrix.

It is unnecessary for us to consider what effect these acts, coupled with the testamentary documents dated the 16th of November, 1819 (and numbered 4 and 5 in the list of fac simile copies), ought to have on the bequests of personal estate contained in the paper of May 10, 1819 (No. 3). It is enough to say, that, with respect to the devise of the realty, which, for the purposes of this part of the argument, it must be deemed to contain, the obliterations and alterations did not operate as a revocation. Even if they are to be regarded as final and absolute, and not as deliberative or dependent alterations, they would only operate to produce an intestacy pro tanto (which would not affect the result of this action) as to the shares of those devisees whose names are struck out, and not as a revocation of the whole instrument. But we incline to think, applying the doctrine of dependent relative revocations, that they are totally ineffectual as to the bequest of real estate. The case of *Winsor v. Pratt*, 2 B. & B. 650 (E. C. L. R. vol. 6), which was cited by Mr. *Couch* on the argument, is an example of that doctrine; and it is supported by a long line of authorities, on the principle stated by Lord Alvanley in *Ex parte Ilchester*, 7 Ves. 373, that, "where it is evident that the testator, though using the means of revocation, could not intend it for any purpose than [*361 to give effect to another disposition, though, if it had been a mere revocation, it would have had effect, yet, the object being only to make way for another disposition, if the instrument cannot have that effect, it shall not be a revocation."

A further argument on the part of the defendant was, that both the papers of the 10th of May and 27th of August, 1819, were revoked by the codicil dated February 19, 1821 (numbered 6 in the list of fac simile documents), by which the testatrix, after giving a life estate in all her property to Dr. G. Rees, wills that, after his decease, her property shall go to the persons mentioned in her will "in the hands of Mr. Fisher, Green Street."

On the part of the plaintiffs, it was argued that this refers to the papers dated 27th August, 1819 (No. 1), and May 10th, 1819 (No. 3). But we agree so far with the counsel for the defendant, that it does not sufficiently appear that these documents were the will to which reference is thus made. But, inasmuch as no testamentary paper is forthcoming which answers the description of "my will in the hands of Mr. Fisher of Green Street," it is proved by the cases of *Hitchins v. Basset* and *Goodright v. Harwood*, to which there has already been occasion to refer, that the mere fact of such a will having been once made, the contents of it being unknown, cannot operate as a revocation of any other will which is found in existence after the death of the testator.

For these reasons, we are of opinion that the claimant James Dickinson in his own right, and the other claimants as representatives of George Dickinson, Joseph Ibbott, and Sarah Ibbott, mentioned in the

*362] testamentary paper of May 10th, 1819, are each of *them respectively entitled to one-seventh of the three undivided fourth parts of the lands and premises in question; and that judgment must be entered accordingly. Judgment for the plaintiffs.

In *Tonnele v. Hall*, 4 Comst. 140, it was held that where a will otherwise properly executed, refers to another paper already written and so describes it as to leave no doubt of its identity, such paper makes part of the will, although the paper be not subscribed or even attached. But where the maker of a deed of gift, handed it to one to hold till it was called for and referred to it in his will thus: "I give and bequeath to my son S. in addition to what I had given him by deed of gift,"—it

was held the reference was not sufficient to incorporate it into the will, and parol evidence was not admissible to show that it was the deed referred to. *Bailey v. Bailey*, 7 Jones' (Law) N. C. 144.

It is text law that a will unmistakably referred to in a codicil, is proved by the proof of the codicil: *Moore v. White*, 6 J. Ch. 360 (375*); *Haven v. Foster*, 14 Pick. 534; *Duncan v. Duncan*, 23 Ill. 364; *Murray v. Oliver*, 6 Ire. Eq. R. 55.

LIDGETT and Others v. PERRIN and Another. Nov. 18.

Goods were put on board a ship consigned for Calcutta, at 39s. per ton "payable in London."—Held, that it was for the jury to say from the surrounding circumstances whether the contract was a contract for "freight" contingent on the ship's arrival at her destination, or for a sum payable on the receipt of the goods on board her.

THIS was an action brought in the Sheriffs' Court, London, by a plaintiff issued on the 13th of September, 1860, to recover the sum of 37*l.* 0*s.* 10*d.* for freight and primage of 300 boxes of soap alleged to have been shipped by the defendants on board the *Earl of Eglinton*, of which the plaintiffs were the charterers, on a voyage from London to Calcutta.

The particulars of demand accompanying the plaintiff were as follows:—

"In the Sheriff's Court, London, &c.

"London, 10th January, 1860.

"Messrs. G. & R. G. Perrin,

"Drs. to freight per ship *Earl of Eglinton* Captain Wardrop, for Calcutta.

	£	s.	d.
"C. 1/300, 300 boxes, 700 feet, 39s.	34	2	6
Primage	1	14	2

35 16 8

"Interest on 35 <i>l.</i> 16 <i>s.</i> 8 <i>d.</i> from 10th January to 13th September, 247 days, at five per cent. }	1	4	2
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£37 0 10

*563] *The cause was tried before the Judge of the said Court on the 17th of October, 1860, when the plaintiff George Lidgett

was examined as a witness for the plaintiffs; and by direction of the said Judge the plaintiffs had the choice of being nonsuited or taking an adjournment on payment of costs. The plaintiffs elected the latter course, and obtained leave to amend their particulars of demand. The amended particulars delivered on the 9th day of November, 1860, were as follows:—

“In the Sheriff’s Court, London, &c.

“This action is brought to recover 34*l.* 2*s.* 6*d.* freight of 300 boxes, measuring 700 feet, at 39*s.* per ton of 40 feet, per the ship *Earl of Eglinton*, bound from London for Calcutta, and 1*l.* 14*s.* 2*d.* primage; such two sums making together 35*l.* 16*s.* 8*d.*

“The plaintiff will also seek to recover the sum of 35*l.* 16*s.* 8*d.* as money received by the defendants for the plaintiffs’ use.

“And they will also seek to recover the same sum as money due upon accounts stated between the plaintiffs and the defendants.”

On the 14th of November, 1860, the cause came on for hearing upon the amended particulars, when the plaintiffs were nonsuited, subject to the following case:—

The plaintiffs in this action are shipowners and ship brokers carrying on business at Billiter Street, City, as John Lidgett & Sons. The defendants are shipowners and agents, and carry on business at Lime Street, in the City, as G. & R. G. Perrin.

At the end of the year 1859, the plaintiffs chartered the ship *Earl of Eglinton* for a voyage from London to Calcutta. She was put on the berth as a general ship in the usual way, and the plaintiffs advertised for cargo.

On the 5th of January, 1860, the defendant Richard *Goolden Perrin called upon the plaintiffs. He said he had soap to ship for Calcutta, and inquired what rate of freight the plaintiffs required. After some negotiation, the plaintiffs agreed to take it at 39*s.* per ton of forty feet. The defendant did not disclose the existence of any principal on that occasion. The plaintiffs gave the defendant on that occasion a card, of which the following is a copy:—

“Will meet with quick despatch. For Calcutta direct. The magnificent high-classed British-built ship *Earl of Eglinton*, A. 1. for thirteen years, 1275 tons register. John N. Wardrop, commander. Loading in the London Docks. Has fine accommodation for passengers in her spacious poop. Apply to John Lidgett & Sons, 9 Billiter Street, E. C.”

(Endorsed.) “15 tons boxes soap, 39*s.* per ton of 40 feet; payable here. J. L. & S.”

The memorandum on the back of the said card “payable here” means that the freight was payable in London. Three hundred boxes of soap, containing 700 feet, were ultimately shipped on board the *Earl of Eglinton* under the said contract, which, at 39*s.* per ton of 40 feet would give 34*l.* 2*s.* 6*d.* for the freight of the said soap. The amount of the primage was 1*l.* 14*s.* 2*d.*; making together the sum of 35*l.* 16*s.* 8*d.*, being the amount mentioned in the particulars of demand.

The *Earl of Eglinton* was lost on the voyage in question. The plaintiffs offered evidence to prove, that, by the custom, where the freight was made payable in London, it was payable lost or not lost; but, as the witness George Lidgett admitted on cross-examination that

the captain had signed a bill of lading in respect of the carriage of the said soap, and as the counsel for the plaintiffs were not able to produce *365] the bill of lading or give secondary evidence of its contents. *the Commissioner thought that evidence of the custom was immaterial, and held, that, in the absence of the bill of lading, there must be a nonsuit as to the freight.

The case having been adjourned, George Lidgett, one of the plaintiffs, was further examined, and said,—

“After the sailing of the ship, I called at the defendants’ office, and saw the defendant Richard Goolden Perrin. I applied to him for payment of the freight. He said it was not convenient; that he would have paid it if we had called before, as he had the money in his hands. He asked me to give him two or three weeks. I said, ‘Say how long.’ He said he could not say exactly then. I said I would not wait an indefinite time. I asked when he would pay it. He said he would call on the following Saturday and let me know when he would pay it. I said I had better call on Gray & Co. He said ‘Do not call on Grays; they won’t pay you.’ I said ‘Very well, if you tell me when to call, and will pay at that time, I will not call on them.’ This was in July. He did not keep his appointment on the Saturday,—and, on the same day, I called on Gray & Co., and applied for payment of the freight. I saw the defendant on a subsequent occasion. He said, ‘What have you been saying to Gray about us? You said we were the curse of the trade.’ I said ‘Mr. Gray tells me that he has paid you the money.’ He made no remark as to the money. He said he would call on the Saturday and pay the money. He did not do so. I saw him afterwards at his office. He said ‘I brought you the money once, and you would not have it; and now you will have to wait for it.’ We had declined to allow him to deduct the primage.”

Cross-examined: “I said to him on the first occasion simply that I *366] had come for the freight. I wrote the *following letter of the 21st of August, 1860, to the said Messrs. Gray & Co.:—

“9 Billiter Street, London,
“21st August, 1860.

“Gentlemen,—We have applied without effect to your agents Messrs. Perrin & Co., of Lime Street, for your freight per Earl of Eglinton; and have now to give you notice, that, unless it is paid to us by 12 o’clock to-morrow, we shall apply to the County Court for our remedy. We have waited patiently for a long time; and the writer called yesterday to see you, in the hope of an amicable settlement. We think you should see we get our due in this matter without the trouble of legal proceedings.

“Messrs. Henry Gray & Co.”

“JOHN LIDGETT & SONS.”

The plaintiff George Lidgett also admitted that he had called on Messrs. Gray & Co. upon other occasions; also that the bills of lading were delivered to Messrs. Gray & Co.

James Cannon said: “I am in the plaintiffs’ employment. I called at the defendant’s office and saw him. I asked for the freight on the soap per Earl of Eglinton. He said he was surprised we had not sent for it before. It was all right, and he would send it in. I made the same application a second time, and he said he would send it in.”

Cross-examined: "I cannot tell the month or day that I made either of these applications, and made no memorandum of the replies I obtained."

John Cannon, clerk to the plaintiffs, said: "The defendant came to our office on the 25th of August last, and saw Mr. John Lidgett. I was present at the interview. He said he had called to settle the freight. He produced money. He wished to deduct the primage. The plaintiff would not consent to this, but *said, 'If you'll pay interest from the time the freight was due, I'll allow the [367 primage.' They parted without anything being done.

Henry Gray,—called by the defendant,—said: "I did not employ defendant as my agent. He called on me and said he heard I had some soap for Calcutta, and he could take it cheaper than I could do it elsewhere. I told him I had soap. He told me the rate of freight per the Earl of Eglinton. I agreed to ship the goods. I saw the plaintiffs after the goods were on board, and asked for the bills of lading in the name of Gray & Co. The plaintiffs told me they could not give me the bills of lading, as they had not been signed by the captain. A day or two afterwards I applied again and obtained them, and they were made out in the name of Gray & Co. The vessel sailed in January, and was lost shortly afterwards, and before reaching her destination. I have since been applied to by the plaintiffs frequently by letter as well as personally for the freight, but have been unable to pay, and have since stopped payment. I have paid the defendants money on a general account, having had many transactions with them from time to time prior and subsequent to the 5th January. There is a balance now due to them. I never gave them any special directions to appropriate any money in payment of freight of the Earl of Eglinton."

Upon this evidence the Commissioner directed a nonsuit; but, to save expense, it was arranged that, if the Court should be of opinion that the nonsuit was right, then judgment was to be entered for the defendants with costs. If it should be of opinion that the nonsuit was wrong, then the Court to direct a verdict for the plaintiffs, with costs, for such amount as it might think fit, or to direct a new trial on such terms as the Court might think fit,—the costs of and incident to this case to abide the event.

**Murphy*, for the plaintiffs.—Though nominally a claim for [368 freight, the contract in reality was for money payable on the goods being put on board the vessel: *Andrew v. Moorhouse*, 5 Taunt. 435; *Kirchner v. Venus*, 12 Moore's P. C. Cas. 361: at all events, the question should not have been withdrawn from the jury. If the term "freight" was used between the parties in the sense of money to be paid upon receipt of the goods, the contract subsequently reduced into writing (between Gray and the captain) would not be the contract originally entered into. The fact of the captain's signing a bill of lading was not conclusive to show that any contract had ever been reduced into writing. The plaintiff was no party to any such contract. Independently of the parol evidence, it is submitted that the words mean, payable lost or not lost.

Pearce, contra.—The card constituted no contract: it was nothing more than the ordinary information as to the time of the ship's sail-

ing. The words "payable here" mean no more than "Not payable in Calcutta." The delivery of the goods must precede the payment of the freight. The contract was with Gray & Co. The particulars call the sum "freight," and it was always demanded as "freight." [ERLE, C. J.—It was called for as "freight" after it was known that the ship had gone to the bottom. BYLES, J.—It is not an uncommon thing to call this freight.]

ERLE, C. J.—Upon the evidence before the learned Commissioner, there clearly was a question for the jury whether the defendants had entered into a contract for the payment of the stipulated sum whether the vessel arrived or not. I am well aware of the weight to be attached to the contract contained in the bill of lading, and am also *369] willing to give full effect to the *plaintiffs' letter of the 21st of August. But, in point of law, it was perfectly competent to the defendant to bind himself to pay 39s. per ton for the goods on their being put on board. He might have owed Gray & Co. the money; or he might have hired a portion of the hold of the ship. At all events, it was a question for the jury, and the learned Commissioner was bound to leave it to them for decide.

The rest of the Court concurring, Rule absolute for a new trial.

WALLIS v. LITTELL.

The plaintiff declared upon an agreement by the defendant to transfer to him a farm which he (the defendant) held under Lord Sydney, "upon the terms and conditions of the agreement under which the same was held by the defendant under Lord Sydney :"—

Held, that, in support of his claim to damages for a refusal on defendant's part to perform the contract, it was not necessary for the plaintiff to produce the agreement under which the defendant held.

The defendant pleaded that the agreement declared on was made subject to the condition that it should be null and void if Lord Sydney should not within a reasonable time after the making of the agreement consent and agree to the transfer of the farm to the plaintiff :—

Held, that it was competent to the defendant to prove by extraneous evidence this contemporaneous oral agreement,—such oral agreement operating as a suspension of the written agreement, and not in defeasance of it.

THIS was an action for the breach of a contract to transfer a farm.

The declaration in substance stated that the defendant occupied a certain farm under Lord Sydney, and that it was agreed between the plaintiff and defendant that the defendant should transfer the farm to the plaintiff "upon the terms and conditions of the agreement under which the same was held by the defendant under Lord Sydney," and that the plaintiff should have immediate possession, and pay the rent, taxes, and tithes from Michaelmas, 1860, and should pay the sum of *370] 200*l.* for live and dead stock as *enumerated: General averment of performance by the plaintiff of all conditions precedent to be performed on his part: Breach, that the defendant refused to transfer the farm to the plaintiff, or to give him possession thereof.

The defendant, amongst other things, pleaded,—first, non assumption.—secondly, a special plea alleging that at the time of the making of the agreement in the declaration mentioned, it was agreed by and between the plaintiff and the defendant, and the said agreement in the declaration mentioned was made subject to the terms and conditions

that the said agreement should be null and void if the said Lord Sydney should not within a reasonable time after the making of the said agreement consent and agree to the said transfer as in the declaration mentioned; and that Lord Sydney would not within such reasonable time as aforesaid consent or agree to the said transfer, and refused so to do, although often requested by the defendant so to do. Issue thereon.

The cause was tried before Keating, J., at the sittings in London in Trinity Term last. The material facts were as follows:—The defendant occupied a farm under Lord Sydney. Being desirous of giving it up, he entered into an agreement with the plaintiff to transfer his interest in it to him in consideration of the plaintiff's paying him the sum of 200*l.* for the stock, crops, &c. It was known to both parties that the transfer could not be effected without the consent of Lord Sydney: and the defendant swore that he had made it a condition of the agreement that Lord Sydney's consent should be obtained, otherwise the contract was to be null and void.

The plaintiff paid 100*l.* on account, and an agreement was drawn up and signed by the defendant embodying the terms of the bargain, but omitting all mention of Lord Sydney's consent to the transfer. Subsequently the plaintiff, with the knowledge of [*371 and without objection by the defendant, sold a cow and a pair of ducks which had formed part of the defendant's stock.

Lord Sydney declining to accept the plaintiff as his tenant, the defendant was unable to carry out the agreement, and offered to return the plaintiff the 100*l.*, which the latter declined to accept, but brought this action.

On the part of the defendant it was objected, that, inasmuch as the declaration alleged the contract to be a contract to transfer the farm upon the terms and conditions of the agreement under which the same was held by the defendant under Lord Sydney, it was essential for the plaintiff, in order to sustain his declaration, to prove the agreement between Lord Sydney and the defendant.

For the plaintiff it was also insisted that the parol evidence as to the agreement or undertaking of the parties that the contract was to be void in the event of Lord Sydney's consent to the transfer not being obtained, was inadmissible to control the written agreement.

Both objections were overruled, leave being reserved to either party to move should it become necessary.

The jury found that there was such an agreement as alleged in the second plea; and accordingly a verdict was entered for the defendant on the second issue, and for the plaintiff on all the others, with 64*l.* damages.

Shee, Serjt., on a former day in this term, obtained a rule nisi to enter a nonsuit, on the ground that the agreement under which the premises mentioned in the declaration were held by the defendant under Lord Sydney was not produced, or for a new trial on [*372 the ground that the verdict on the first issue was against the evidence on which the jury found the issue on the second plea for the defendant.

Huddleston, Q. C., also obtained a rule nisi to enter a verdict for the plaintiff on the second issue, pursuant to the leave reserved to him, on the ground that the parol agreement mentioned in the second plea

was inadmissible to vary the written agreement, or for judgment for the plaintiff on the second plea non obstante veredicto, on the ground that the agreement in that plea was not stated to be in writing. He referred to *Adams v. Wordley*, 1 M. & W. 374.†

Huddleston, Q. C., and *Holl*, who appeared to show cause against the first rule, were stopped by the Court.

Shee, Serjt., and *Sharpe*, in support of that rule, contended, upon the authority of *Turner v. Power*, 7 B. & C. 625 (E. C. L. R. vol. 14), 1 M. & R. 135 (E. C. L. R. vol. 17), *Whitford v. Tutin*, 10 Bingh. 394 (E. C. L. R. vol. 25), 4 M. & Scott 166 (E. C. L. R. vol. 30), *Buxton v. Cornish*, 12 M. & W. 426,† and *Strother v. Barr*, 5 Bingh. 136 (E. C. L. R. vol. 15), 2 M. & P. 207, that the agreement under which the defendant held the farm under Lord Sydney having been made an essential part of the contract declared on, its non-production was a ground of nonsuit, inasmuch as the Court and jury had not before them the whole materials for assessing the damages for the alleged breach. [WILLIAMS, J.—The plaintiff does not complain of the breach of any of the terms of the agreement referred to, but that the defendant altogether refused to transfer the farm to him.]

*373] *Shee*, Serjt., and *Sharpe*, then proceeded to show *cause against the second rule.—The defendant is clearly entitled to retain his verdict on the second plea, which in substance alleges that the agreement declared on was made subject to the condition that it should be null and void if Lord Sydney should not within a reasonable time after the making of the agreement consent and agree to the transfer of the defendant's farm to the plaintiff, and that Lord Sydney refused his consent. Both parties were aware that the consent of Lord Sydney was necessary. The proof of that fact was not an attempt to vary in any way the effect of the written contract,—for inasmuch as it related to the transfer of land, it must necessarily have been in writing: it showed that the contract was never to come into operation as a contract at all, unless that condition precedent were complied with. In *Davis v. Jones*, 17 C. B. 625, it was held that parol evidence was admissible to show that a written contract which had no date was not intended to operate from its delivery, but from a future uncertain period: and *Jervis*, C. J., said: "It was perfectly competent to the plaintiff,—the agreement being silent on the subject,—to show by parol testimony that it was not intended to take effect until the happening of something else." And *Crowder*, J., said: "I think it is quite impossible to contend, after the decision in *Murray v. The Earl of Stair*, 2 B. & C. 82 (E. C. L. R. vol. 9), 3 D. & R. 278 (E. C. L. R. vol. 16), that the plaintiff might not show that the agreement, though signed by her, was not to be operative until something else was done. *Morris* proved that it was agreed between himself and the plaintiff at the time that the rent was not to commence until the date was filled in, and that the date was not to be inserted until the completion of the repairs. The evidence was clearly admissible." That case was followed by *Pym v. Campbell*, 6 Ellis & B. 370 (E. C. L. R. vol. 88), *374] where it was held that *evidence was admissible to show that an instrument (in writing) was not intended to operate as an agreement between the parties until a third party had approved of it. It is impossible to distinguish those cases from the present.

Huddleston, Q. C., and Holl, in support of the rule.—The authority of *Davis v. Jones* and *Pym v. Campbell* is not disputed: the only question is whether the matter sought to be introduced by extraneous evidence was a condition precedent or a defeasance. You may always show by parol evidence that an instrument executed between the parties was not meant to operate as an agreement until the happening of a given condition: but you cannot show by parol that the agreement is to be defeated on the happening of a given event. In the two cases relied on, there never was any perfect agreement at all.

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the Court: (a)—

In this case, at the time when the parties made a written agreement to assign a farm, with immediate possession, there was an oral agreement that the written agreement was to be void if Lord Sydney, the landlord, did not consent to the assignment. In an action for not assigning, the pleas were,—first, non assumpsit,—and, secondly, the oral agreement, and that Lord Sydney did not consent. The jury found that Lord Sydney did not consent, and that the oral agreement was made: thereupon, the question has been, whether *the evidence was admissible. If it was, both pleas ought to be found [*375 for the defendant, and there would be no judgment non obstante verdicto on the second plea.

We are of opinion that it was admissible. In *Pym v. Campbell*, 6 Ellis & B. 370 (E. C. L. R. vol. 88), and *Davis v. Jones*, 17 C. B. 625 (E. C. L. R. vol. 84), it was decided that an oral agreement to the same effect as that relied on by the defendant might be admitted, without infringing the rule that a contemporaneous oral agreement is not admissible to vary or contradict a written agreement. It is in analogy with the delivery of a deed as an escrow: it neither varies nor contradicts the writing, but suspends the commencement of the obligation.

It was contended for the plaintiff that the present case could be distinguished from those cited, on the ground that the intention here was that the written agreement should take some effect, but should be liable to be defeated if the event mentioned in the oral agreement happened. The stipulation for immediate possession, and the facts that money was paid by the plaintiff, and a cow sold by the plaintiff, in part execution of the agreement, were relied on to show that the oral agreement was a defeasance merely, and, if so, it would be in contradiction of the written agreement, which was in terms absolute.

But this is a question of fact: and we think there is evidence that the fact is not so. The evidence shows that the defendant introduced the oral agreement for his benefit, and has treated the written agreement as suspended, having always retained possession of his farm. Also the subject-matter of the two agreements is strong to show that the oral suspended the written agreement from the beginning, and was not in defeasance of it; for, the written agreement was to assign, but the possibility of assigning was supposed to *depend on [*376 Lord Sydney's consent; and the oral agreement that the written agreement should be void if he did not consent, is in its nature a condition precedent: the defendant in effect says,—“If I have the power

(a) The case was argued before Erle, C. J., Williams, J., Byles, J., and Keating, J.

to act, I will agree; but if I have no power to act, I make no agreement at all."

On these grounds we think that the verdict for the defendant on the second plea should stand, and the rule for judgment non obstante veredicto be discharged.

We also think that this evidence would have entitled the defendant to a verdict on non assumpsit.

We also think that the rule to enter the verdict for the defendant, on non assumpsit, by reason of the non-production of the lease by Lord Sydney, should be discharged.

According to our construction, the parties agree to assign a lease, to be held on the terms of Lord Sydney's lease, not to assign in a particular manner, to be ascertained by the terms of that lease. The agreement is set out in the declaration in its literal terms, and might be performed literally by an assignment in the terms of the agreement, without producing Lord Sydney's lease.

If, upon examination, it should appear that the pleadings require amendment, the Court amends according to the evidence and on consideration of the effect of it.

Rules accordingly.

Parol evidence that a written agreement was not to be binding until other signatures had been obtained, is ad-

missible: *Butler v. Smith*, 35 Miss. (6 George) 457.

*377]

*BRADLAUGH v. EDWARDS. Nov. 5.

It is no ground for a new trial, that, the plaintiff having been asked while under cross-examination whether he was the author of a certain pamphlet which contained expressions of opinion on religious subjects altogether at variance with those generally received amongst Christians, and having declined to answer on the ground that his answer in the affirmative might subject him to a criminal prosecution, the counsel for the defendant was permitted for a considerable time (obviously with a view to prejudice the plaintiff with the jury), to read various passages of a similar tendency from other printed documents, each time repeating the inquiry whether the plaintiff was the author or whether the passage read expressed his notions on the subject,—the jury being entitled to have before them all the facts and circumstances from which they might be enabled to judge of the degree of credit due to the party as a witness.

Nor is it a ground for a new trial, in an action for an assault and false imprisonment, that the plaintiff had incurred an expense of 7l. 14s. in procuring his discharge from custody, and the jury have awarded him a farthing only.

THIS was an action for an assault and false imprisonment. Plea, not guilty by statute,—the statutes referred to in the margin being the 2 & 3 Vict. c. 93, and 3 & 4 Vict. c. 88.

The cause was tried before Channell, B., at the last Summer Assizes at Exeter. The circumstances out of which the action arose were these:—The plaintiff, a gentleman who professes the most extreme latitude of opinion on theological subjects, in the month of February last, hired a field in the neighbourhood of Devonport for the purpose of delivering lectures there. The hiring (for which he paid 10s.) was under an unstamped written agreement (in the form of a receipt), which was signed by Mrs. Tozer, the wife of the owner of the field, in his name, and was for the use of the field for two meetings. The

plaintiff, having thus hired the field, publicly announced his intention to deliver an address, but the announcement was silent as to its subject. The defendant, who is the superintendent of the Devonport constabulary, anticipating from what he knew of the plaintiff's principles, that the lecture he was about to deliver would be of an objectionable character, took upon himself, without (as he alleged) instructions from any one, to go to the owner of the field, and to use his influence with him to rescind the agreement which his wife had made with the plaintiff. In this he so far succeeded that the owner, after the first attempt of the plaintiff to lecture there, *served him with a notice [*378 requiring him to desist from coming there again.

At the time appointed for the delivery of the first lecture, a considerable number of persons had assembled, when the plaintiff, addressing them, said: "I am about to address you on the Bible." No sooner had he uttered these words, than the defendant, accompanied by five or six constables, stepped forward, and desired him to desist; and, on his refusal to comply with this command, the plaintiff was forcibly removed from the field, and subsequently taken to the police-station, where he was detained without bail until the following morning upon a charge of assaulting the superintendent (the now defendant), which charge the magistrates on a full investigation, occupying two days, found to be altogether groundless.

The plaintiff was put to an expense of 7*l.* 1*s.* in procuring bail before the magistrates, and in getting together evidence to establish his defence.

The plaintiff put in the receipt signed by Mrs. Tozer, but the learned Judge rejected it, as immaterial to the matter in issue.

The plaintiff having been examined in chief by *Collier*, Q. C. (who with *Cole* conducted his case at the trial), was examined at great length by *Montague Smith*, Q. C., who with a view to discredit him with the jury, sought to elicit from him that he entertained and had in various writings promulgated doctrines at variance with the opinions commonly received amongst Christians. The learned counsel produced a pamphlet which contained much of this objectionable matter, and asked the plaintiff if he was the author of it. The plaintiff declined to answer the question, on the ground, that, if he answered it in the affirmative, he might subject himself to a criminal prosecution under the statute 1 W. & M. c. 18. The learned Judge ruled *that he was not bound to answer. The defendant's counsel [*379 then proceeded to read twelve or fourteen other passages from the same pamphlet, asking the plaintiff at the end of each (with the like result) whether or not that was written by him and expressed his sentiments. This course of proceeding was strenuously objected to by the plaintiff's counsel, as being obviously intended and calculated to excite a prejudice against him in the minds of the jury. The learned Judge, however, did not interfere to prevent this repetition of the question: but he told the jury that they must not permit themselves to be influenced by it.

The learned Baron, in leaving to the case to the jury, began by observing that the doctrines entertained by the plaintiff and those who thought with him were much to be deplored; for that, although in strictness there was no *evidence* before them upon the subject, there

could be no doubt as to the tendency and character of the lecture about to be delivered. He further told them that the defendant in his character of constable had a right to be in the field: and he left it to them to say whether or not there had been any assault committed by the plaintiff, or, in other words, whether the defendant had made out his justification.

The jury returned a verdict for the plaintiff, damages one farthing.

Mr. *Bradlaugh*, in person, on a former day in this term, moved for a rule nisi for a new trial, on the grounds,—first, that evidence was improperly rejected,—secondly, that evidence was improperly admitted,—thirdly, that the learned Judge misdirected the jury,—fourthly, that the verdict was against the evidence, and perverse, and the damages inadequate.

The first point, the rejection of the memorandum under which the *380] plaintiff had hired the field, was not *much pressed. As to the second point, it was strongly urged that the whole course of the cross-examination, and the perseverance of the defendant's counsel in the questions as to the plaintiff's presumed authorship of the pamphlet, should have been discountenanced by the learned Judge, inasmuch as its only object could be (and, as the result showed, evidently must be) to prejudice the plaintiff and discredit him in the eyes of the jury. [KEATING, J.—The Judge could do no more than caution the jury to dismiss that matter from their minds.] The caution was idle when the counsel was permitted to continue reading the several passages and repeating the question. Then, the summing up of the learned Judge was eminently calculated to divert the attention of the jury from the issue they had to try. The question being whether the assault and false imprisonment of the plaintiff were justified by the circumstances and the position of the defendant, the doctrines entertained by the plaintiff,—assuming that there was any evidence on the subject before them,—ought not to have been paraded before the jury in the way they were, with the expression of a judicial opinion that those doctrines were to be deplored as subversive of the best interests of society. The whole course of the summing up showed the impropriety of allowing the cross-examination which took place. The learned Judge was also wrong in telling the jury that the defendant as a police constable had a right to be present at the meeting. He might by reason of the invitation held out by the announcement of the meeting have been entitled to be there in his private capacity; but he had no duty as a constable to be there, unless there was reasonable cause for apprehending a breach of the peace. The verdict evidently was not the result of a deliberate exercise of judgment and discretion on the part of the jury, but was plainly influenced by the *381] unfair mode in which the trial was *conducted, and the erroneous ruling of the learned Judge. As to the damages, the verdict was manifestly perverse, the plaintiff having proved that he necessarily expended 7*l.* 14*s.*, and the jury having awarded him by way of compensation for that loss, as well as for the inconvenience and indignity to which he was unlawfully subjected, only one farthing.

ERLE, C. J.—We will speak to my Brother Channell before we decide whether the rule should go or not. *Curr. adv. vult.*

ERLE, C. J., now delivered the judgment of the Court.—In this case

the plaintiff in person moved for a rule to show cause why there should not be a new trial, on several grounds. It appeared that the plaintiff, having hired a field for the purpose in the neighbourhood of Plymouth, was proceeding to deliver an address, when the defendant, the superintendent of the Devonport constabulary, interposed to prevent it, and took the plaintiff into custody for an alleged assault, and caused him to be conveyed to the police station, and thence before certain justices, who, after a lengthened investigation, decided that the charge was unfounded, and dismissed the plaintiff. The two questions before the jury were,—first, whether there was any justification for the assault and imprisonment,—secondly, what damages the plaintiff was entitled to. The jury found that there was no justification: the only question, therefore, which remained for them was, what damage the plaintiff had sustained. The jury estimated that damage at one farthing. The main complaint now is, that there was a miscarriage on the part of the learned Judge, in several respects. In the first place, it is said that he failed in his duty in not properly controlling *the learned counsel for the defendant in his mode of conducting the cross-examination of the plaintiff. [*382 The complaint made is, that the counsel, producing a certain pamphlet, asked the plaintiff if he was the author of it; and, upon his declining to answer the question, upon the ground that his admission of the authorship might render him liable to a criminal prosecution, and the learned Judge ruling that he was not bound to answer, the counsel proceeded to read several portions of the pamphlet, repeating after each the question as to the plaintiff's being the writer, which the latter each time on the same ground declined to answer, thus, it is contended, by a circuitous mode obtaining what was tantamount to an admission on the part of the plaintiff that he was the author, and so exciting undue prejudice against him in the minds of the jury. We learn from my Brother Channell, who, in order that he might accurately inform us of what passed, has referred to his notes, that the plaintiff is under some misapprehension on the subject. The learned Judge reports to us that the course at the trial was this:—The plaintiff having declined to say whether or not he was the author of the pamphlet produced, and the Judge having ruled that he was not bound to answer, Mr. *Smith* read a certain letter (which probably formed part of the contents of the pamphlet), and asked the plaintiff whether he was the writer of that letter. And so of the other questions,—each relating to a distinct and different document; so that it was not, as was represented by the plaintiff on moving, repeating the question as to the authorship after reading several passages from the same book or document, as to the whole of which the plaintiff had protected himself by his first refusal. Taking that as the report of the learned Judge, we hold that the first ground upon which this application rests fails in point of fact. *Although I am of [*383 opinion that the presiding Judge has the duty, as was contended by the plaintiff, of controlling the counsel where they for the purpose of prejudicing a party with the jury, or for any other purpose, persevere in putting questions which the Judge has ruled to be improper, or which the witness is not by law compellable to answer, I am by no means clear that a mistake made by the Judge in the

exercise of his discretion in that respect would afford ground for a new trial. That point, however, for the reasons I have already stated, does not arise upon the present occasion.

The second ground of complaint was, that the learned Judge commenced his summing up by deploring the opinions professed by the plaintiff, as being subversive of the best interests of society, and so materially prejudiced the minds of the jury against him. The report made to us by the learned Judge disposes of this ground of objection also; for, he tells us that he commenced by telling the jury, that, however much he and the jury might deplore the existence of doctrines and opinions such as those to which allusion had been made, they must endeavour to dismiss them from their minds, and keep their attention fixed solely upon the evidence, and give their verdict according to the truth and justice of the case. There is therefore no pretence for saying that the plaintiff sustained any prejudice from the manner in which the case was left to the jury. The learned Judge tells us that the defendant's counsel in his address commented freely upon the evil tendency of the doctrines which the plaintiff was assumed to entertain; and that the remarks which fell from him were intended to recall the attention of the jury to the issues which they had to try, and that he did so as clearly and distinctly and impartially *384] as his faculties permitted him to do: and *the jury upon the conflict of evidence before them came to the conclusion they did.

The next ground of complaint was that the plaintiff did not have an impartial trial: the defence having been conducted at the expense of the borough fund, and many of the jury being in all probability contributors to that fund. We have, however, no information in a legal shape that any of the jurors were in point of fact contributors to the borough fund, or that any of them came from the borough of Devonport. That ground of complaint, therefore, also entirely fails.

The last ground of the motion was, the inadequacy of the damages, the jury having awarded the plaintiff only a farthing by way of compensation for his detention for several hours at the police station, when the expense actually incurred by him in defending himself and obtaining his release from that unfounded charge was 7*l.* 14*s.* Now, if I saw clearly that there had been anything like an intentional violation of right or duty on the part of the jury, I should think it a fit case for the interference of the Court. But, unless that was very clearly made out, I should be extremely scrupulous to enter into any discussion as to the amount of damages, which is entirely a matter for their consideration. Where a party has been illegally imprisoned, and has been put to expense in procuring his discharge, he may very well urge that fact before the jury as an aggravation: but he has no *right* to demand to be reimbursed *ex debito justitiæ*. It is in the discretion of the jury to give him such damages as they may consider a sufficient compensation for the wrong the party has sustained, irrespective of any expense he may, perhaps needlessly, have incurred in his defence. I am altogether unaware of the nature of the plaintiff's religious opinions and belief: but I do know that *some men pro- *385] fess to entertain notions and opinions the dissemination of which the law holds to be a crime, and which men of sound and well-

regulated minds would generally esteem to be erroneous and pernicious; and, if they thought the plaintiff was about to give utterance to opinions such as those hinted at on the trial, it may be that the jury considered that a very small compensation was due to him for preventing him from doing that which he himself might afterwards have deeply regretted, and therefore that the injury he had sustained by the short imprisonment he endured was one for which a large sum ought not to be paid, but, on the contrary, was in the result a substantial benefit to the plaintiff, and therefore amply compensated by the small sum they have awarded him. Upon the whole, I am not satisfied that wrong has been done, and therefore am not disposed to interfere.

WILLIAMS, J.—I entirely agree with what has fallen from my Lord, and would only add, with reference to the contention of the plaintiff that he ought at all events to have had a verdict for the amount of the expenses incurred by him in his defence before the magistrates, that he had no more right to recover those expenses than a plaintiff in an action for an assault has to recover the amount of the surgeon's bill for the dressing of his wounds. It is a matter which the jury may take into their consideration, but that is all.

BYLES, J.—I am of the same opinion. By the law of England, a man has an undoubted right to hold what opinions he pleases. But, as my Lord has observed, there are persons who profess opinions which strike at the very root of all public and private order and *mo- [386] rality, and the dissemination of which is more mischievous than almost any act that can be committed. To publish these is a crime justly punishable by the law. I wish also to add a word as to the power and the duty of the Judge to prevent the reiteration of irrelevant questions. I apprehend the rule to be this,—that, when a question is put with a view to discredit a witness, the Judge has no right to interpose merely because it is not relevant to the matter in controversy between the parties; but that, when the question is neither relevant to the matter in controversy nor to the character and credit of the witness as such, the Judge has a perfect right to prevent such question from being put. If it were not so, every man who enters the witness-box would be exposed as in a kind of moral pillory, to public odium, contempt, and ridicule. But, like my Lord, I am not aware of any case in which a new trial has been moved for on the ground of the Judge having declined to exercise his discretion in this respect. This, therefore, being a mere application for a new trial on the ground of the inadequacy of the damages, in a case which was purely for the jury, I am of opinion that we ought not to interfere.

KEATING, J.—I agree with the rest of the Court in thinking that no rule ought to be granted in this case. With regard to the complaint that the defendant's counsel was allowed repeatedly to put questions for the purpose of endeavouring to elicit from the plaintiff the fact that he entertained peculiar opinions upon religious subjects,—it seems to me that it was highly important that the jury should be fully possessed of all the facts which could show what amount of credit was due to the witness. Though I fully agree that such a course of examination should not be carried to the *extent of persecution, yet [387] I think it right that the jury should have every opportunity,

either from his answers or from his refusal to answer, of forming their own estimate of the credit due to him. Rule refused.(a)

(a) The plaintiff on a subsequent day asked for leave to appeal: but the Court were unanimously of opinion that the case was not a fit one for an appeal.

The Company of FREE FISHERS AND DREDGERS OF WHITSTABLE in the County of KENT v. GANN.

GANN v. JOHNSON and Others. June 2.

A grant by the Crown to a subject of the soil of the seashore below low-water mark, and of a toll for the anchorage of vessels there, may be presumed to have had a legal origin: and such a toll, if found to exist, may be enforced by distress.

By deeds of lease and release of the 11th and 12th October, 1791, the manor of Whitstable, and the royalty of fishery or oyster-dredging within the said manor, were conveyed to A. and B.

By deeds of lease and release of the 24th and 25th of October, 1792,—reciting, amongst other things, that, within the said manor of Whitstable, there is, and for many hundred years then last past had been, a fishery for the growth and improvement of oysters, extending from the sea-beach for a very considerable distance into the sea, managed by a company of free-dredgers called “The Whitstable Company of Dredgers,”—the *manor* (proper) was limited to A. and two others, in fee, and “the royalty of fishery or oyster-dredging, and the right of taking oysters and other fish within the said manor, and the ground and soil of the said fishery, and also the customary payments usually and of right made to the lord of the said manor for or on account of the anchorage of any ship or vessel, or the landing of any goods or merchandise within the said manor,” &c., to C., in fee, on behalf of the Company.

By an Act of 33 G. 3, c. 42, the Whitstable Company of Dredgers were incorporated by the name of “The Company of Free Fishers and Dredgers of Whitstable;” and, in pursuance of that Act, the fishery, and all rights appertaining thereto, were by deeds of lease and release of the 4th and 5th of June, 1793, conveyed to the Company.

It appeared in evidence that the oyster fishery extended about two miles from the shore, and far below the ordinary low-water mark; and that the Company and those under whom they claimed had so far back as the year 1775 claimed a toll of 1s. from every vessel anchoring or grounding within the space covered by their conveyance; and three instances were proved of the claim having been enforced by distress from vessels anchoring on the oyster-ground below low-water mark, when resisted,—there being no evidence to show that the claim had ever been resisted without recourse being had to a distress:—

Held, that, it being competent to the Crown to grant the soil of the seashore and the right to anchorage, the evidence was sufficient to justify the presumption of a grant having a legal origin; that the right of distress was incident to the right to the anchorage; and that the right to the anchorage was not destroyed by the severance of the marine from the terrestrial part of the manor.

THE first of these was an action brought by the plaintiffs, a company incorporated by the 33 G. 3, c. 42, under the name of “The *388] Company of Free Fishers and Dredgers of Whitstable, in the county of Kent,” to try their right to receive a payment of 1s. for every vessel anchoring on certain land covered by the sea, the soil of which was claimed by the plaintiffs.

The declaration was in the *indebitatus* form for anchorage. The defendant pleaded never indebted.

The cause was tried before Erle, C. J., at the last Spring Assizes at Maidstone, when a verdict was found for the plaintiffs, leave being reserved to the defendant to move to enter the verdict for him if the Court should be in his favour upon the points hereinafter mentioned,—both parties undertaking to be bound by the decision of the Court thereon, unless the Court should give leave to appeal, and to appeal

on those points only on which the Court should so give leave. The evidence given at the trial was in substance as follows:—

By deeds of lease and release, bearing date respectively the 11th and 12th of October, 1791, the fee simple of the manor of Whitstable, &c., were conveyed to Edward Foad and James Smith in equal moieties as tenants in common in fee. The following is an extract from the conveying part of the deed of release:—"All that the manor of Whitstable, with all and singular the rights, royalties, privileges, members, and appurtenances thereof, in the said county of Kent; and also all courts-leet, courts-baron, perquisites and profits of Courts, to the same belonging or in any wise appertaining: And also all those quit-rents payable yearly to the said manor by several persons, formerly said to amount to the sum of 13*l.* 18*s.*, but now to the sum of 17*l.* 16*s.* per annum:

"And also all the fishery of Whitstable, being a royalty of fishery or oyster-dredging within the said manor, formerly computed to be of the yearly value of 23*l.* 4*s.*, but now of 76*l.* 15*s.* 2*d.* per annum, on an *average for the last seven years; together with all and singular messuages, houses, outhouses, buildings, dove-houses, [*389 barns, stables, mills, tofts, yards, orchards, gardens, lands, tenements, meadows, leasowes, pastures, feedings, closes, enclosures, woods, underwoods, trees, rents and services of tenants and farmers, quit-rents, free-rents, rents of assize, ways, paths, passages, waters, streams, fishings, fishing-places, watercourses, ponds, pools, moats, warrens, wastes, waste-grounds, commons, common of pasture, furzes, heaths, moors, marshes, courts-leet, courts-baron, views of frankpledge, perquisites and profits of courts and leets, homages, fealties, reliefs, heriots, escheats, fines, issues, amerciaments, goods and chattels of felons and fugitives and of persons attainted and of persons outlawed and put in exigent, deodands, waifs, estrays, treasure-trove, fines, forfeitures, mines, quarries, and all other royalties, franchises, liberties, rights, jurisdictions, privileges, immunities, profits, commodities, emoluments, advantages, and hereditaments whatsoever to the said manor, royalty, and fishery, hereditaments, and premises hereby granted and released, or intended so to be, or any of them, belonging or in anywise appertaining, or therewith held, used, occupied, or enjoyed, or accepted, reputed, taken, or known as part, parcel, or member thereof, or to be had, received, perceived, or taken, used, exercised, or enjoyed in, upon, or out of, or arising from the same manor or lordship, royalty, and fishery, hereditaments, and premises, or any of them, or any part or parcel thereof."

By deeds of lease and release bearing date respectively the 24th and 25th of October, 1792, it was, amongst other things, recited and limited as follows:—

"And whereas, within the limits of the said manor of Whitstable, there is, and for many hundred years *now last past hath been, [*390 a fishery for the growth and improvement of oysters, extending from the sea-beach for a very considerable distance into the sea, and which fishery during all that time hath been managed and carried on by and at the expense of a certain company of free dredgers, called The Whitstable Company of Dredgers, who have held the same from time to time as tenants under the lord of the said manor, and claim to

he entitled to hold the same as free fishers, on payment of such annual rents as are hereinafter mentioned: And whereas it hath been contracted and agreed by and between the said parties to these presents, that, for the several considerations hereinafter mentioned, a division shall be made in the rights of the said manor, royalty, fishery, hereditaments, and premises, and to that end that the said manor and all the lands, grounds, quit-rents, and manor rights belonging thereto (except as hereinafter is mentioned) shall be the property of the said Edward Foad, John Nutt, and Stephen Salisbury, their heirs and assigns, and that all the rights of the lord of the said manor in the said fishery, and the ground and soil thereof from the south and south-east sides of the sea-beach (which from time to time have been considered as the land boundaries of the said fishery), and in the customary payments usually made to the lord of the said manor for or on account of the anchorage of any ship or vessel, or for the landing of any goods or merchandise, or for the admission of freemen, or other payments for the regulation of the freemen or fishery, and all other payments whatsoever at the water-court of free dredgers there within the jurisdiction of the said manor, and other such like payments, and all forfeitures, articles, and things which of right belong to and are the property of the lord of the said manor by reason of any wrecks of the sea or such *391] like rights and *forfeitures arising within the limits of the said sea-beach, shall be the property of the said Thomas Foord, his heirs and assigns."

"All that the said manor, and the said messuages, lands, quit-rents, rights, royalties, liberties, privileges, hereditaments, and all and singular other the said premises hereby or mentioned or intended to be hereby granted and released, with their and every of their appurtenances, save and except the said royalty of fishery or oyster-dredging, and the right of taking oysters and other fish within the said manor, and the ground and soil of the said fishery, and also the customary payments usually and of right made to the lord of the said manor for or on account of the anchorage of any ship or vessel or for the landing of merchandise within the said manor, or for the admission of freemen, or other payments for the regulation of the freemen and fishery there, and all other payments whatsoever at the water-court of free dredgers there, and all such like payments, and all manner of forfeitures, articles, and things which of right belong and are the property of the lord of the said manor by reason of any wrecks of the sea or other such like rights and forfeitures arising within the limits of the sea-beach aforesaid,"—were limited, as to one third to Edward Foad in fee, as to one other third to John Nutt in fee, and as to the remaining third to Stephen Salisbury in fee.

And "all the said royalty of fishery or oyster-dredging, and the right of taking oysters and other fish within the said manor, *and all the ground and soil of the said fishery*, extending as hereinafter is mentioned, and also the *customary payments usually and of right made to the lord of the said manor for or on account of the anchorage of any ship or vessel*, or for the landing of any goods or merchandise *within the said* *392] **manor*, or for the admission of freemen, or other payments for the regulation of the freemen and fishery there, and all other payments whatsoever at the water-court of free dredgers there, and all

such like payments, and all manner of forfeitures, articles, and things which of right belong unto and are the property of the lord of the said manor by reason of any wrecks of the sea or other such like rights and forfeitures arising within the limits of the sea-beach aforesaid, and all remedies for the recovery of the said premises respectively."—were limited to the said Thomas Foord, in fee.

The deed of release contains the following clauses:—

"And, in order to ascertain the boundary of the said oyster-fishery, and how far the right of the said Thomas Foord, his heirs and assigns, therein shall extend, it is expressly agreed by and between the said Edward Foad, John Nutt, Stephen Salisbury, and Thomas Foord, for themselves severally and respectively, and for their several and respective heirs and assigns, that from henceforth the south and south-east sides of the sea-beach of Whitstable aforesaid, as the same is and hereafter shall be thrown up by the sea from time to time, shall be considered and taken as the boundary between the lands of them the said Edward Foad, John Nutt, and Stephen Salisbury, their heirs and assigns, and the lands of the said Thomas Foord, his heirs and assigns; and that such sea-beach *and all the lands and grounds from thence into the sea so far as the said fishery extends*, whether the same be more or less than the quantity of land now belonging to the said fishery, and all payments or dues for the anchorage of any ships or vessels or for the landing of any goods or merchandise there, and for the admission of freemen, and other payments for the regulation of the freemen and fishery, and all other payments whatsoever at the water-courts or courts of dredging there, *and all wrecks of the sea and other [*393 manor rights and forfeitures there found, shall from henceforth be held and enjoyed by and be the property of the said Thomas Foord, his heirs and assigns, subject to the right of the said Company of dredgers in the said fishery:

"And, the better to effect the purpose of the now reciting indenture, the said Edward Foad, John Nutt, and Stephen Salisbury appointed the said Thomas Foord, his heirs and assigns, their attorney and attorneys, and did thereby give unto the said Thomas Foord, his heirs and assigns, power to appoint a steward or stewards and water-bailiff or water-bailiffs, or other usual officers of the said fishery, and to summon and hold all such water-courts or courts of dredging as should be necessary to be held for admitting freemen to participate in the rights of the said fishery with the present and future freemen thereof, and to impanel and swear any jury at such courts, and make all such by-laws and orders for better regulating the said Company of dredgers as should be thought expedient and for the advantage of the Company; and also to ask, demand, collect, and receive from all and every person and persons whomsoever all customary payments or dues for the anchorage of any ships or vessels, or for the landing of any goods or merchandise within the said manor, and for the admission of freemen, and other payments for the regulation of the freemen at the said courts, and all other dues, wrecks of the sea, and such like manor rights and forfeitures which should be there found, and to detain and keep the same for the use of the said Thomas Foord, his heirs and assigns, and upon receipt thereof to give acquittances, &c., and, in cases of refusal, to bring actions," &c.

*394] By the said Act 33 G. 3, c. 42, the said free fishers *and dredgers of Whitstable were incorporated. They have ever since carried on the fishery there to a great extent.

By indentures of lease and release bearing date respectively the 4th and 5th of June, 1793, and made between the said Thomas Foord of the one part, and the said Company of Free Fishers and Dredgers of Whitstable, in the said county of Kent, of the other part,—after reciting in the said indenture of release the hereinbefore abstracted indentures of the 11th and 12th October, 1791, a mortgage by the said Edward Foad to George Rigden, and the reconveyance by the said George Rigden, and the said abstracted indentures of the 24th and 25th of October, 1792,—and reciting that the purchase so made by the said Thomas Foord of the said royalty, fishery, and hereditaments, was by him contracted for on the part of the Company of free fishers and dredgers aforesaid, and the sums of 800*l.* unto the said Edward Foad, and of 1530*l.* unto the said James Smith, making 2230*l.*, which were the consideration-moneys in the said indenture of release of the 25th October, 1792, mentioned to have been paid by the said Thomas Foord for the purchase of the said premises, were the moneys of the said Company, and no part thereof of the said Thomas Foord, which he did thereby acknowledge,—it was witnessed, that, in consideration of the premises, and of 10*s.*, he the said Thomas Foord did grant, release, and confirm unto the said Company of free fishers and dredgers (in their actual possession, &c.), and to their successors and assigns, All that the royalty of fishery or oyster-dredging, and the right of taking oysters and other fish within the manor of Whitstable, in the said county of Kent, *and the ground and soil of the said fishery,* *395] extending as thereinbefore was mentioned; and also the *customary payments usually and of right made to the lord of the said manor for or on account of the anchorage of any ship or vessel, or the landing of goods or merchandise within the said manor, or for the admission of freemen, or other payments for the regulation of the freemen and fishery there, and all other payments whatsoever at the water-court of free dredgers there, and all such like payments, and all and all manner of forfeitures, articles, and things which of right belonged unto and were the property of the lord of the said manor by reason of the wrecks of the sea or other such like rights and forfeitures arising within the limits of the sea-beach aforesaid, and all and singular other the premises which in and by the said recited indentures of lease and release of the 24th and 25th of October, 1792, became vested in the said Thomas Foord, his heirs and assigns, or in any person or persons whomsoever in trust for him and them; and all the reversion, &c.; and all the estate, &c.; and all deeds, &c.,—To hold the same unto and to the use of the said Company of free fishers and dredgers, their successors and assigns, for ever."

The defendant was the owner of a vessel called the Amoret; and, on the 29th of September, 1860, the said vessel cast anchor at Whitstable on the land covered by the water of the sea, and below low-water mark; but the spot where the said vessel so anchored was and is within that portion of the manor of Whitstable and fishery aforesaid which is claimed by the plaintiffs under the above deeds, and under the circumstances herein stated, as their soil and freehold.

The plaintiffs' oyster-beds extend from the shore for about two miles out to sea; and the said vessel was anchored about half a mile from the shore, upon part *of the land claimed by the said [*396 Company, but not then used as oyster-beds.

The plaintiffs' claim was for 1s. for the anchoring on the soil which they allege to be theirs.

The plaintiffs gave evidence to prove, and the jury found, that, from 1775 continually down to the present time, they and those under whom they derived title had from time to time claimed as of right to take, and had taken, the sum of 1s. from vessels casting anchor within that portion of the manor on which the defendant's vessel had cast anchor, and that they claimed to take it as a customary payment for such use of the soil.

The defendant at the time in question resided and dwelt within the Cinque Ports at Whitstable,—Whitstable being part of the port of Faversham, which is a limb of Dover. The said vessel at the time she anchored as aforesaid was trading to Whitstable.

The charter of Edward the 4th, in reference to the exemption of the Cinque Ports was proved and put in evidence at trial by the defendant: See Jeake's Charters of the Cinque Ports.

On the part of the defendant, it was submitted that he was entitled to the verdict, on the following grounds,—first, that the soil of the sea where his vessel was anchored, being below low-water mark, was vested by law in the Crown, and could not be held by a subject,—secondly, that the Company had no right to claim any payment for such anchorage,—thirdly, that, if ever the right to demand a payment for anchorage was vested in the lord of the manor of Whitstable, that right was extinguished and destroyed when the manor was divided into two parts (which for distinction were at the trial called respectively the terrestrial *and the marine manor),—fourthly, that, [*397 if the right was not so extinguished and destroyed, the owner of the terrestrial portion of the manor should have been joined as co-plaintiff,—fifthly, that the defendant was under the Cinque Ports charter proved at the trial exempt from the said claim for anchorage.

Under the direction of the learned Judge, the jury found for the plaintiffs, the several points of law above mentioned being reserved.

The second was an action brought by the plaintiff (the brother of the defendant in the former case) for the conversion by the defendants (the officers and servants of the plaintiffs in the former action) of an iron chain belonging to the plaintiff, which was seized by the defendants as a distress for the anchorage or groundage claimed by the Company under the circumstances detailed in the statement of the former case.

The defendants pleaded,—first, not guilty,—secondly, that the goods were not the plaintiff's,—thirdly, that, long before and at the time of the conversion of the said goods in the declaration mentioned, the Company of Free Fishers and Dredgers of Whitstable, in the county of Kent, were, and still are, seised in their demesne as of fee of and in the ground and soil of a certain fishery in the said county of Kent, to wit, from the south and south-east sides of the sea-beach at Whitstable, in the said county, as the same is thrown up by the sea from time to time, and the sea-beach, and all the lands and grounds from thence

into the sea as far as the said fishery extends: and the said Whitstable Company, and all those whose estates they now have, and at the same time when, &c., had, of and in the said ground and soil of the said *398] fishery, with the appurtenances, from time whereof the memory of man is not to the contrary, have had, received, and taken from every ship or vessel arriving and anchoring on the said ground and soil of the said Company, a certain reasonable toll or duty by way of anchorage for the said vessel, and for coming and anchoring on the said ground and soil of the said Company; and, when and as often as the said toll or duty hath been and remained unpaid after reasonable request and demand thereof made by the owners and proprietors of the said ground and soil for the time being, from time to time, from time whereof the memory of man runneth not to the contrary, have used and been accustomed as of right to seize and take a distress or pledge from and off the said vessel as and for and by way of security for and in order to obtain payment of the said toll or duty: that, before and at the time of the said conversion in the declaration mentioned, a certain vessel of the plaintiff had arrived and come into and upon the said ground and soil of the said Company, and was then anchored thereon, and was then liable to pay the said reasonable toll for such anchorage as aforesaid, to wit, the sum of 1s.: that the plaintiff, having had notice of the premises, and being requested to pay the amount of the said reasonable toll for anchorage of his said vessel, neglected and refused so to do; whereupon the defendant James Waters, then being the water-bailiff of the said Whitstable Company, and acting as such, and in the execution of the commands and by the authority of the said Company, and the said other defendants as the servants of and aiding and assisting the said defendant James Waters in his said duty, and in order to obtain payment of the said toll, and as *399] and for a reasonable distress or pledge for the said toll, *seized and took the said goods of the plaintiff in the declaration mentioned, to wit, the said iron chain, the same being a reasonable distress in that behalf, and then being in and upon the said vessel of the plaintiff so then anchored on the said ground and soil of the said Company, and kept possession of the same for the purpose aforesaid until the said toll should be paid, and which never has been paid; and which was the said conversion and depriving the plaintiff of his said goods in the declaration mentioned. Issue thereon.

This cause came on to be tried immediately after the former, the evidence in which it was agreed should be read.

On the part of the plaintiff, it was contended that the Company were not entitled to the right claimed, and were not entitled to distrain, on the following grounds,—first, that the soil of the sea where the plaintiff's vessel was anchored, being below low-water mark, was vested by law in the Crown, and could not be held by a subject,—secondly, that the Company had no right to claim any such payment for such anchorage,—thirdly, that if ever the right to demand a payment for anchorage was vested in the lord of the manor of Whitstable, that right was extinguished and destroyed when the manor was divided as aforesaid into two parts, the terrestrial and the marine,—fourthly, that, if the right was not so extinguished and destroyed, the owner of the terrestrial portion of the manor should have joined in author-

izing the distress,—fifthly, that the plaintiff was under the Cinque Ports charter exempt from the said claim for anchorage,—sixthly, that, assuming the right to the ls. anchorage to be established, the Company had no right of distress as incidental to the right of anchorage, or otherwise.

*A verdict was taken for the plaintiff, subject to the same reservation of leave and upon the same terms as in the former case. [*400]

Lush, Q. C., in Easter Term last, on the part of the defendants in *Gann v. Johnson*, obtained a rule nisi to enter a nonsuit, on the grounds,—first, that by law the defendants were entitled to distrain for the anchorage,—secondly, that there was evidence from which the jury might and ought to have found a usage to distrain, if that were necessary.

Hawkins, Q. C., on a subsequent day, on the part of the defendant in *The Free Fishers of Whitstable v. Gann*, also obtained a rule nisi to enter a nonsuit, on the following grounds,—first, that the soil of the sea where the defendant's vessel was anchored was vested in the Crown,—secondly, that there was no evidence of any grant of the said soil to the plaintiffs, and the Judge presiding at the trial ought not to have left it to the jury to say whether upon the evidence they were satisfied that the plaintiffs had the alleged right,—thirdly, that, if the soil was vested in the plaintiffs, they had no right to claim any payment for such anchoring,—fourthly, that there was no evidence to support the plaintiffs' case or their right to take the toll claimed, and the Judge should have so directed,—fifthly, that if ever the right to demand a payment for anchorage was vested in the lord of the manor of Whitstable, that right was extinguished and destroyed when the manor was divided,—sixthly, that, if the right was not so extinguished or destroyed, the owner of the terrestrial portion of the manor should have been joined as a co-plaintiff,—seventhly, that the defendant was under the charter proved at the trial *exempt from the claim or demand made—eighthly, that the verdict was against the evidence. [*401]

Hawkins, Q. C., and *Joyce*, showed cause against the first rule.—The first plea, which sets up a right to take a toll from vessels anchoring on the ground and soil of the Company, and a right to distrain for it if unpaid, was not sustained by the evidence. It was distinctly proved by the plaintiff (Mr. Gann) that his vessel was anchored below low-water mark: and it is clear that a subject cannot have a manor out of the kingdom, in a place which is subject to the Admiralty jurisdiction. [ERLE, C. J.—The evidence was, that the vessel was anchored as far below the low-water mark of a medium tide as the low-water mark is below the medium high-water mark on the beach. *Lush, Q. C.*—The Company claim the whole soil of the manor as far as the fishery extends. ERLE, C. J.—The deed and the Act of parliament confirming it convey the soil and the right of anchorage. It must be assumed to be found that the Company have taken anchorage from all vessels anchoring on the oyster-ground.] Anchorage is a franchise incident to a port or harbour: but this is claimed in a spot which is an arm of the sea. A right of distress can only exist by the common law; and the common law of England does not extend below low-water mark. [WILLIAMS,

J.—There certainly is more difficulty in saying that there can be a right of distress for anchorage than for pickage and stallage, where the soil is used.] If the right could exist here, it would be incident to the manor, which has been severed from the fishery. But it is submitted that the severance has destroyed the right; otherwise, this inconvenience might follow, that by severance the rights and burthens might be multiplied. And, assuming that the *right was not
 *402] lost by the severance, at all events the persons interested in the other portion of the manor should have been joined. Besides, Gann was a resident of one of the Cinque Ports (of which Whitstable is a member), and therefore by the charter of Edw. 4 free of "terrage" or anchorage: see Jeake's Charters of the Cinque Ports, edit. 1728, p. 57. [ERLE, C. J.—The evidence was certainly very scanty. But it was assumed to be almost a matter of course that the Company had a right to distrain for the 1s. anchorage, if they were entitled to the anchorage at all.]

Lush, Q. C., Denman, Q. C., and Needham, contra.—The right of distress is incident by law to the right to anchorage. And, if not, there was abundant evidence here of a prescriptive right to distrain. Anchorage is a compensation payable to the owner of the soil for the use of the soil, and very much resembles pickage and stallage: *Hale de Jure Maris*, c. v. In *Gilbert on Distress*, 4th edit. 18, it is said: "A third case where a distress lies, is, for toll in a fair or market. And here the law is clear, that, where a lord has a fair or market by prescription, and hath used to take toll of cattle sold, if such toll be not paid the lord may seize any of the cattle so sold, and retain them till satisfaction be made for the toll. For, the prescription is built on a grant of the King which by length of time is supposed to be worn out; and that grant was originally made for public utility; fairs and markets being instituted for the more convenient supplying the subject with the necessaries and conveniences of life. And therefore every subject that buys there may very reasonably be charged for that convenience with a moderate toll; and the lord hath the advantage of the
 *403] *toll as a compensation for the mischief done to his soil by the beasts sold. And as the lord might have distrained the beasts for damage feasant if he had not such fair, so he may distrain for the toll which is in nature of a compensation for that damage. Hence, it should seem reasonable, that, where the fair or market subsists merely by grant from the Crown,—as, where the fair is newly created by grant,—and toll thereby given to the grantee, that he may distrain for such toll: for, *qui sentit commodum sentire debet et onus*; and an action of debt would be no remedy." There is no intimation of a contrary opinion to be found in any of the books. In *Vinckestone v. Ebdon*, 5 Mod. 359, it was held, that, if a corporation be entitled to a toll of 5d. a chaldron on all coals shipped at a certain port, the *tackle* of the ship on which such coals are laden, or the *coals*, may be distrained, at the election of the party, for the non-payment of the toll. And see *The Mayor, &c., of Truro v. Reynolds*, 8 Bingh. 275 (E. C. L. R. vol. 21), 1 M. & Scott 272 (E. C. L. R. vol. 28). To make the right worth anything, the power of distress must necessarily be incident to it. [ERLE, C. J.—This is not quite analogous to the case of a market. The anchorage is claimed for something done upon that which is a common

highway for all Her Majesty's subjects.] The charge is in respect of the anchor entering the soil of the company. [ERLE, C. J.—Assuming the company to be entitled to the soil, what authority is there for saying that there can be a right in a subject to take toll in respect of something done below low-water mark? WILLIAMS, J.—In *Hale de Portibus Maris*, ch. vi., p. 72, it is said: "As touching the right of the lord of the port, we have before shown, that, though of common right the King is *primâ facie* the owner and lord of every public seaport, yet a subject may by charter or prescription be *lord or owner of it. This ownership that the King *primâ facie* hath, and a [*404 subject may have, is of two kinds; and sometimes, and most commonly, they concur in the same person: but they may be divided, viz. the interest or ownership of propriety, and the ownership of franchise. 1. The ownership of propriety is, where the King or common person by charter or prescription is the owner of the soil of a creek or haven where ships may safely arrive and come to the shore. This interest of propriety may, as hath been shown, belong to a subject. But he hath not thereby the franchise of a port; neither can he so use or employ it, unless he hath had that liberty time out of mind or by the King's charter. Indeed, he may bring thither for his own private use his own boats and vessels to carry off and bring in his own goods that are not customable, as, fish, &c.; but he may not use it as a public port, or admit foreigners, unless in case of necessity, *nor take toll or anchorage there*; for, that is fineable, either by presentment or in a *quo warranto*, as hath been shown. 2. The ownership of franchise. This is that which gives the formality or denomination of a public or lawful port, and becomes a free arrival of ships to lade and unlade their goods and merchandises; and this may be acquired by prescription, or by creation by the King either by proclamation or by charter. Before any port is legally settled, although the propriety of the soil of a creek or harbour may belong to a subject or private person, yet the King hath his *jus regium* in that creek or harbour; and there is also a common liberty for any to come thither with boats and vessels as against all but the King. And, upon this account, though A. may have the propriety of a creek or harbour or navigable river, yet the King may grant there the liberty of a port to B., *and so the interest of propriety and the interest of franchise [*405 several and divided. And in this no injury is at all done to A., for he hath what he had before, viz. the interest of the soil, and consequently the improvement of the shore and the liberty of fishing: and, as the creek was free for any to pass in it against all but the King, for it was *publici juris* as to that matter before, so now the King takes off that restraint, and by his license and charter makes it free for all to come and unlade." The reason of that is, that toll of that sort is a flower of the Crown, which no subject can have without a grant from the crown.] This is not a claim of toll traverse, but for a payment or compensation for the use of the soil. If the right to distrain be not incident by common law to the prescriptive right claimed, there was at all events evidence whence the Court would be justified in inferring its existence with a legal origin. As far as living memory went the toll of 1s. for anchorage was demanded from all vessels, and distrained for where the demand was not complied with. Then, can there be a right in a subject to the soil of an arm

of the sea below low-water mark? By the deeds of the 11th and 12th of October, 1791, the manor and fishery were conveyed by Lord Bolinbroke to Foad and Smith, by the description of "All that the manor of Whitstable, with all and singular the rights, royalties," &c.: and also "all the fishery of Whitstable, being a royalty of fishery or oyster-dredging *within the said manor*," which in the Act of parliament incorporating the company (33 G. 3, c. 42) is described as "extending from the sea-beach a very considerable distance into the sea." Then, the deeds of the 24th and 25th of October, 1792, which divide the marine portion of the manor from the terrestrial, vesting the latter in *406] Foad, Nutt, and Salisbury, and vesting in *Thomas Foord (in trust for the company) "all the rights of the lord of the said manor in the said fishery, *and the ground and soil thereof* from the south and south-east sides of the sea-beach," also describe the fishery as extending from the sea-beach for a very considerable distance into the sea. An oyster-fishery necessarily differs from every other sort of fishery, the possession of the soil being essential to it. [ERLE, C. J.—An easement would be enough.] The conveyance, the recitals in the Act of Parliament, and the acts of user, all are consistent only with the right to the soil. [WILLIAMS, J.—A man may have a right to hold a market or fair on the soil of another. But, if he has always been used to take pickage and stallage, that would be cogent evidence of ownership of the soil in him.] The effect of a grant by the Crown of an oyster-fishery was considered in the recent case of *The Queen v. Cunningham*, 28 Law J., M. C. 96. [WILLIAMS, J.—That case depended upon its own peculiar facts: it cannot much assist this argument.] *Scratton v. Brown*, 4 B. & C. 485 (E. C. L. R. vol. 10), 6 D & R. 536 (E. C. L. R. vol. 16), is more to the purpose. There, by lease and release dated in 1773, A. B., lord of the manors of M. H. and P. P., bargained and sold unto C. D., E. F., and G. H., "all that messuage, tenement, boat-house, &c., and also all that and those the sea-grounds, oyster-layings, shores, and fisheries of him A. B., commonly called and known by the name and names of M. H. and P. P. shores or sea-grounds, with full and free liberty to C. D., E. F., and G. H., and their heirs and assigns for ever, to fish, dredge, and lay oysters thereon, and from thence to take and carry away the same, which said sea-grounds, oyster-layings, shores, and fisheries extended from the south at low-water mark to the north at high-water mark, and from certain sea-grounds on the east to other sea-grounds on *407] the west: And all which said sea-grounds, oyster-layings, shores, and fisheries thereby granted, released, &c., contained in the whole by estimation 800 acres of land covered with water, or thereabouts, as the same were beaconed, marked, and stubbed out." Reservation "to the grantor, his heirs and assigns, lord of the two manors, of all manor of fish-royal, and all wrecks of the sea, flotsam, jetsam, and ligan within the said manors, and all manner of franchises." And by the tenendum the grantees were to hold the messuage, tenement, and boat-house, sea-grounds, oyster-layings, shores or fisheries, hereditaments, and premises, with the appurtenances, of the grantor, lord of the two manors, by such suit of court and other services as were or of right ought to be done and performed by the other freehold tenants of the same respective manors seised of estates of inheritance in fee: and it was held, that, by this deed, the right of

soil in the seashore passed to the grantees. This is one of the outlets of a navigable river, within the definition of an "arm of the sea" in *Hale de Jure Maris*, p. 19, where it is said: "The most of the rights of fishing in the sea and arms and creeks thereof belonging by usage to subjects, will appear to be by reason of the propriety of the very water and soil wherein the fishing is, and some of them even within the ports of the sea." Again, at p. 21, it is said that "a subject may by prescription have a wear in the sea, and consequently have an interest below the low-water mark." Again, at p. 33, the learned author says: "The discovery of the extent of the prescription or usage, whether it extend to the soil or not, rests upon such evidences of fact as may justly satisfy the Court and jury concerning the interest of the soil." Amongst the franchises which may belong to a subject, Lord Hale (p. 74) mentions "anchorage," which he *describes [*408 as "a prestation or toll for every anchor cast there; and some- times though there be no anchor. And this doth in truth properly and *primâ facie* arise from or in respect of the propriety of the soil, and is an evidence of it. But yet it is not so always, but grows due in respect of the franchise; for, many times where the shore of a harbour belongs to a private Lord or owner, yet if at full sea a ship lets fall an anchor upon that place, the King or lord of the port in point of franchise hath usually the anchorage." The next objection is, that the right claimed by the Company, if ever it existed, was lost by the severance of the manor. The payment, however, is claimed in right of the ownership of the soil, and may exist by immemorial usage although the manor itself has ceased to exist: *Scriven on Copyholds*, 4th edit., p. 6. Many maritime corporations,—the corporation of Southampton, for instance,—have anchorage rights below low-water mark. Here, the severance was under the authority of the Act of parliament. The last objection is, that the plaintiff, being an inhabitant of Whitstable, a member of one of the Cinque Ports, is by force of the charter of Edward the 4th exempted from this charge. This point cannot arise in the case of *Gann v. Johnson*; for, there the plaintiff merely takes issue on the title alleged by the defendant's third plea. On the broader ground, however, it is submitted that the charter of Edward the 4th does not apply to anchorage; and, further, that, even if the words are large enough to include anchorage, the Crown had no right to exempt an individual or the inhabitants of a district from a payment due to a subject in respect of the use of his own property. To whom is the exemption granted? To the "barons," or freemen or residents or inhabitants of the Cinque Ports: **Jeake's Charters of the Cinque Ports*, p. 6. And the words of exemption are as follows:—"And of our more plentiful [*409 grace, also of our meer motion and certain knowledge, have granted, and by these presents do grant, for us and our heirs, as much as in us is, to the same barons and good men of the Cinque Ports aforesaid, and to the barons and good men of all and singular the ports and towns of the members of the said Cinque Ports, or to any of them, annexed, united, and appertaining, that they, their heirs and successors, and whosoever are resident within the ports and members aforesaid, or within any of them, contributing to the service and shipping aforesaid, may be quit for ever of toll, panage, pontage, kaisage, murage, passage, lastage, stallage, tallage, carriage, peisage,

picage, *terrage*, and scot and gild, hildage, scuttagc," &c. Then, is anchorage within the charter? There is no such word used; and "*terrage*," which is found in the charter, merely means bringing to land, a due "for unloading goods before they come up to the common key" (*Hale de Portibus Maris*, p. 76), and not a breaking of the soil. The plaintiffs' right must be assumed to have had existence prior to the statute of *Quia Emptores* (18 Ed. 1), and therefore, be it a claim of toll, or for a compensation for the use of the land, it was not competent to the Crown to derogate from its own grant: *Chitty's Prerogatives of the Crown*, p. 195.(a) [WILLIAMS, J.—It is quite clear that *410] this is a *claim of toll. You cannot have an uniform fixed toll without a Royal grant. You may take a compensation for passing over your land, but not a uniform fixed toll.] This is not a claim of toll traverse.

Hawkins, Q. C., and *Joyce*, in support of the second rule.—The soil of the sea below low-water mark is vested in the Crown, and the Crown has no power to grant it to a subject, in derogation of the rights of the public. In an Anonymous Case, 1 Campb. 517, n., Wood B., says: "A navigable river is a public highway; and all persons have a right to come there in ships, and to unload, moor, and stay there as long as they please. The privilege of the plaintiff must be subservient to the rights of the public. It would be of very mischievous consequence if the owner of a fishery could prescribe to the public how and where they are to moor in a navigable river. The defendant had a right to moor and remain where his ship lay as long as convenience required: yet, if he acted wantonly and maliciously for the purpose of injuring the fishery, the plaintiff is entitled to a verdict, but not otherwise." The Crown itself could not claim anchorage in this spot: and, if so, it was not competent to it to grant such a right to a subject. A grant of the soil to a *411] *subject could only be made subservient to the rights of the public. The grant of a "fishery" conveys, not a territorial, but an incorporeal hereditament only: and "the holder of an exclusive prescriptive right of fishery in public waters enjoys it subservient to the superior and sacred right of the public to use an arm of the sea or river for the purposes of navigation:" *Chitty's Prerogatives of the Crown*, c. 8, s. 7, p. 143. The title under which the Company claim commences with the deeds of the 11th and 12th of October, 1791, which purport to be a grant, not by the Crown, but by Lord Bolingbroke to Foad and Smith: and the conveying part professes to grant the manor and the fishery; but not a word is said about the soil or about anchorage, nor as to the extent of either. The deed of 1792, by which the manor was divided, professes for the first time to convey

(a) In *Hale de Portibus Maris*, p. 75, it is said: "These kinds of duties were sometimes called tolls, sometimes consuetudines; touching which, when they were in the King's hand, not lodged in a subject by grant or prescription, the King by his charter might, and often did, grant discharges, as well as of other inland tolls. But, when they were before lodged in a subject by grant or prescription, the King could not discharge these by his charter; and by this we may the better understand those ancient charters. Vide *Cart. Antiq. E. R.* n. 8, the grant of R. 1 to the Abbots of Peterborough to be quit of all toll in foris et nundinis et omni transitu pontium maris et portuum maris: the like, *ibid.* L. 11, 26, by Hen. 2 to the Abbot de loco Sancti Edmundi, to be quit of toll in omnibus foris et nundinis, et in omni transitu pontium viarum et maris per totum regnum; and in some cases to be quit de omnibus consuetudinibus, in tide and of tide, by strand and by stream, &c., which are not intended of customs properly so called, which is the business of the third part of this book."

"the ground and soil of the fishery." It recites, that, "within the limits of the manor of Whitstable there is, and for many hundred years now last past hath been, a fishery for the growth and improvement of oysters, *extending from the sea-beach for a very considerable distance into the sea.*" and then it professes to grant to the Company "all the said royalty of fishery or oyster-dredging, and the right of taking oysters and other fish within the said manor, and the ground and soil of the said fishery, extending as hereinafter is mentioned:" and then it goes on to define the boundary of the fishery, but it describes only the boundary between the fishery and the terrestrial part of the manor from which it is severed,—*"from henceforth the south and south-east sides of the sea-beach at Whitstable aforesaid, as the same is and hereafter shall be thrown up by the sea from time to time, shall be considered and taken as the boundary between the lands of them the said Edward Foad, John Nutt, and Stephen Salisbury, their heirs and assigns, and the *lands of the said Thomas Foord, his heirs and assigns."* Then comes the conveyance of [*412 June, 1793, which vested the fishery, and the ground and soil thereof, in the Company. There was therefore no actual conveyance of the soil below low-water mark. If any right to anchorage-toll ever existed, it was a right vested in the lord of the manor as incident to the manor, and so lost by the severance. The defendant Gann, as a resident and shipowner at Whitstable, was by the words of the charter of Edward the 4th clearly exempted from this impost.

ERLE, C. J.—I am of opinion that the Company have established their right to the anchorage in contest in these cases. The first piece of evidence was the deed of October, 1791, by which the manor and fishery of Whitstable,—the latter being described as extending from the sea-beach for a very considerable distance into the sea,—were conveyed to one Edward Foad and one James Smith. As far as can be ascertained, the oyster-beds extended about two miles out to sea: and, though the first deed does not in terms profess to convey the soil of the fishery, the subsequent deeds, confirmed by the Act of parliament, do expressly convey the soil as far as the oyster-beds extend. Besides that conveyance, there was some evidence of user by taking 1s. for anchorage from ships anchoring within the locus in quo so early as the year 1775; and there was strong evidence to show that since the date of the conveyance of the fishery to them the Company had uniformly enforced the claim against all ships dropping their anchors within the limits of the fishery. Every presumption is to be made in favour of long usage: and, though the evidence only went back to the year 1775, it has been repeatedly laid down, that, when a continuous user has been shown for a much shorter *period [*413 than that shown here (twenty years' user), in the absence of evidence to the contrary, the jury will be warranted in inferring its existence beyond the time of legal memory. There was therefore evidence in this case from which the jury were warranted in inferring that the anchorage in question had been enforced as far back as the time of legal memory: and there is nothing to prevent the plaintiffs from succeeding, unless it be shown that it is contrary to law to set up such a claim to be exercised below low-water mark. I have listened attentively to the arguments which have been urged on the part of Mr. Gann; but no authority has been brought to our notice

which negatives the possibility of the existence of such a right. The soil of the seashore to the extent of three miles from the beach is vested in the Crown: and I am not aware of any rule of law which prevents the Crown from granting to a subject that which is vested in itself. And, if the Crown did grant the soil of the shore in question, it may well be that the right of taking an anchorage-toll of 1s. was granted with it. Considering the nature of the property,—an oyster-fishery,—it seems to me that there is the strongest possible presumption that the soil would be granted, and the right to the 1s. compensation for anchoring there likewise. Nothing has been cited to show that such a grant could not be made; and many of the passages cited from Hale go to show that a district or arm of the sea, or the soil of a navigable river, may be vested in a subject: and it is most clearly for the interest of the public that a grant should be made for the sustenance of a profitable fishery. There is no authority against it; and the case of *The Duke of Somerset v. Fogwell*, 5 B. & C. 875 (E. C. L. R. vol. 11), is an authority to show, that, where the terms of the grant under which the claim is made are unknown, the owner of a several *fishery may be presumed to be the owner of the soil. Now, *414] the existence of this fishery time out of mind is recited in the Act of 1793. There is nothing to show that at the time of the original grant the soil was not granted. The nature of the grant would render it necessary that the soil should be granted; and I think we are bound to infer from the usage that the toll was granted in respect of the use of the soil. Our attention was called to the case of *The Mayor, &c., of Colchester v. Brooke*, 7 Q. B. 339 (E. C. L. R. vol. 53), in which the Court lay down in very broad terms the right of the subject to the use of the seas and navigable rivers for the passage and mooring of vessels. But the decision we come to on the present occasion does not in the smallest degree interfere with the rights of all persons to navigate and moor their ships in the waters in question. That right is not inconsistent with their liability to pay a toll for the dropping of an anchor in the soil of the Company. There is nothing to show that the law prohibits the enforcement of such a toll by the owners of the soil, and there is authority to show that such a claim may lawfully be made.

Then it was contended, that, assuming that the right to take this toll for anchorage existed from time immemorial, it existed when that which has been called the terrestrial portion of the manor and the fishery were united, and was incident to the manor, and destroyed by the severance effected by the deed of October, 1792, as courts and services incident to a manor are destroyed by the severance of the manor by act of the parties. I think there are two decisive answers to that objection. In the first place, the 1s. for anchorage would not be a service incident to the manor, but a payment or compensation in respect of the use of the soil of that portion of the manor which was *415] conveyed to the plaintiffs, and therefore, on the *division of the manor, would properly go with that part. And, further, if some rights are extinguished by severance of the manor by the act of the parties, the passages cited from *Scriven on Copyholds* show that they are not so extinguished where the severance takes place by the act of the law: and, the severance of this manor having been

effected under the sanction and authority of an Act of parliament, it may be said to have been severed by the act of the law. But the strongest answer is that before given, viz. that the 1s. toll for anchorage would go to the parties to whom the soil of that portion of the manor is conveyed.

The third objection which was urged, was, that the defendant, Gann, as an inhabitant of a limb or member of one of the Cinque Ports, was exempted from this toll by the charter of Edward the 4th, which exempts the barons and good men of the Cinque Ports from a great variety of tolls and imposts. Now, one answer to this objection is, that "anchorage" is not one of the tolls mentioned in that charter. That which approaches the nearest to it is "terrage," which Lord Hale defines to be a toll or custom for putting goods or merchandise on the land or shore,—a thing entirely different from the claim here. I think it may be open to very great doubt whether any person coming to reside in any of the Cinque Ports could, assuming the exemption to exist, claim to be entitled to it. Moreover, the right to the toll must have existed as early at least as the statute *Quia Emptores*, 18 E. 1: and, if it existed in the reign of Edward the First, it was not competent to a subsequent monarch to derogate from the grant of his predecessor. For these reasons, I think Mr. Gann cannot set up any valid exemption by reason of the charter of the Cinque Ports.

In the other action of *Gann v. Johnson*, the main question was whether the Company were by law *authorized to distrain for the 1s. for anchorage. The evidence of usage undoubtedly is [*416 very slight. On three occasions the claim appears to have been disputed, and as many times was it enforced by distress. There was no evidence of any instance where the claim had been resisted and such resistance had not been followed by a distress, the vessel remaining within reach of the officers of the manor or of the Company. But I do not think my judgment would rest on the right being to be inferred from usage only. I think there is a very strong analogy between this and the case of goods brought upon the soil of the lord who has a market or fair, in which case it is laid down that such goods are distrainable for toll, inasmuch as if there were no market or fair the party bringing the goods upon the land would be a trespasser. The right to the toll and the right to distrain for it are incident to the right to bring the goods to the market or fair. As the lord, says Chief Baron Gilbert, "might have distrained for the damage if they had come without a right, so it is to be presumed to be an incident to their right to come that he should have a right to distrain for the toll. The law is clear, that, where a lord has a fair or market by prescription, and is used to take toll, if such toll be not paid the lord may seize any of the cattle so sold, and retain them till satisfaction be made for the toll, for, the prescription is built on a grant from the King, and the grant is made for the public utility." I think the analogy to be drawn from that extends to the present case; and that, the right to the anchorage-toll existing, as I think it does, the right to enforce its payment by distress is an incident annexed thereto by law. The usage is only material as showing that there is nothing to prevent that presumption in this case. The result is, that, in my opinion, the Company are entitled to judg-

*417] ment in the action brought by them for the *toll, and that they are likewise entitled to judgment in the action brought virtually against them for the distress.

WILLIAMS, J.—I am entirely of the same opinion. I do not propose to add anything to what the Lord Chief Justice has said upon the general points of the case. I will merely say a word as to the proposition contended for by Mr. *Hawkins*, that there could not be a legal right in a subject to claim a toll or due for dropping an anchor on a spot which is always covered by the sea. It is said that no amount of usage can establish such a claim, because it could not by possibility have a legal origin. That certainly is an argument which but for the history of our law would be a forcible one. It is said that the public have an unquestionable right to navigate at their free will and pleasure in all navigable rivers or arms of the sea; and that, if they have that right, it follows that they have the right, as incident thereto, to drop their anchors there. The same argument may be and has been urged as to several fisheries claimed in navigable rivers where the tide flows and reflows. The right of fishing in a navigable river or an arm of the sea *primâ facie* belongs to the public at large. But before *Magna Charta* the Monarchs of this realm sometimes thought themselves entitled to abridge the rights of the public in this respect: and that was the origin of the monopoly of several fisheries. Since *Magna Charta*, that can no longer be done. As to the power of the Crown to transfer to a subject the property in the seashore, there can be no doubt. This is distinctly laid down in the passage cited by Mr. *Denman* from *Hale de Portibus Maris*, p. 72, where it is said,—“As touching the first of these, the right of the lord to the port, we have before shown, that, though of common right the King *418] is *primâ facie* owner and *lord of every public seaport, yet a subject may by charter or prescription be lord or owner of it.” That seems to show that by a grant in early times it may have happened that the soil of this marine manor, as it has been called, may have been transferred by the Crown to a subject, from whom the fishery Company derive their title in the manner shown by the evidence. It does not, however, follow, because a part of the soil of the seashore has by grant of the Crown become vested in a subject, that therefore the right to take a toll for anchorage is acquired. The conveyance or transfer of the soil from the Crown to a subject superinduces this consequence, that the owner may prevent the public from using his soil without his permission: but the right to demand and enforce a toll for its use does not necessarily follow. Toll is a matter of Royal grant. That is the reason of the passage from *Hale* to which I referred in the course of the argument, where it is said, “The ownership of propriety is, where the King, or a subject by charter or prescription, is the owner of the soil of a creek or haven where ships may safely arrive and come to shore. This interest of propriety may, as hath been shown, belong to a subject. But he hath not thereby the franchise of a port; neither can he so use or employ it, unless he hath had that liberty time out of mind, or by the King’s charter. Indeed, he may bring thither for his own private use his own boats and vessels, to carry off and bring in his own goods that are not customable, as, fish, &c., but he may not use it as a public port, or admit

foreigners, unless in case of necessity, nor take toll or anchorage there, for that is fineable, either by presentment or in a quo warranto, as hath been shown." That is to say, that, although a subject may be the owner of the soil of a port or an arm of the sea, and may prevent others from anchoring therein, yet he cannot without a Royal [*419] grant or charter demand toll or anchorage there,—which clearly assumes, that, if he had a Royal grant, he might take anchorage. That is an express authority to show that the claim of the owners of the soil in this case may have had a legal origin: and, if so, it seems to me that there was abundant evidence of an exercise of the claim for anchorage here, to warrant the presumption that it had a legal origin.

BYLES, J.—I am of the same opinion; and I have very little to add to that which has fallen from my Lord and my Brother Williams; but I cannot help saying that I see no reason for casting any doubt upon the existence of this very valuable right. Whether the locus in quo was part of a navigable river, or an arm of the sea, in either case it was originally vested in the sovereign. It is plain, from the deeds which were in evidence, that it is now a portion of the manor of Whitstable; and, if so, it must have been granted by the Crown to the lord of the manor at some very early time, before the statute of Quia Emptores, in 1290. The Crown cannot at this day create a manor: it can exist only by prescription. This portion, then, of this ancient manor having come to the hands of the Whitstable Fishery Company in the manner shown by the subsequent conveyances, let us see how they have exercised their rights of ownership. They have used the soil for the formation of oyster-beds; and they have as far back as living memory goes, and farther, demanded and exacted payment of a toll of 1s. from all vessels found anchoring within their fishery. That being so, they are the owners of the soil, with the right to receive a toll for anchorage there. It is said that the right to the anchorage was lost by the severance of the fishery from the terrestrial part of the manor in 1793. But that cannot be so: a manor cannot be [*420] divided by act of the parties in respect of the services due to the lord; but a division of the soil of the manor in no way interferes with the enjoyment of the rights incident to the use of the soil. As to the right to demand the anchorage, I have nothing to add. And, as to the right to enforce it by distress, the passage cited from Gilbert on Distress seems to me to be a strong authority to show that it may be so enforced. The right to anchorage is closely connected with the ownership of the soil: and, unless it could be enforced by distress, it would be next to impossible to enforce it at all, and the right would be valueless. If, then, such a right can exist by prescription, three instances are given in the evidence of its having been exercised, and its exercise acquiesced in.

The small number of instances tends rather to strengthen than to weaken the evidence of the right; because, the less demur there was in payment of the toll, the fewer would be the cases in which the right to enforce it would be exercised. I take it, then, the right is clearly established. I agree with my Brother Williams that toll, even a toll traverse, can only be taken by virtue of a grant from the Crown. That being so, this anchorage is in the nature of a toll, and possibly

may fall within the very general words of the exemption in the charter of the Cinque Ports. But this toll had been created long before the date of that charter: and, having granted it, it was not competent to the Crown to derogate from its grant, by exempting any particular body of men from its payment.

Some observations were made in the course of the argument as to the form of the pleadings in *Gann v. Johnson*. But it is unnecessary to discuss that. The parties clearly went down to try the main question which was involved in both actions. And, without saying that *421] any amendment would be necessary, it is enough to say, that, if an amendment were necessary, it would be made, in order to advance the real justice of the case. Rules accordingly.

BADDELEY v. BERNAND. Nov. 2.

Under the 30th section of the County Courts Amendment Act, 19 & 20 Vict. c. 108, a plaintiff in an action of contract who obtains judgment by default for a sum not exceeding 20*l.*, is entitled to an order for costs under the same circumstances as would have entitled him to costs under the earlier County Courts Acts where he had recovered the like amount by a trial and verdict.

But the application should be made at Chambers.

THIS was an action on a contract, in which the plaintiff obtained judgment by default for a sum less than 20*l.*

The plaintiff's attorney, upon an affidavit that the plaintiff at the time of the commencement of the action lived more than twenty miles from the defendant, applied to Byles, J., at Chambers, for an order for costs, under the 30th section of the County Courts Amendment Act, 19 & 20 Vict. c. 108, which enacts, that, "where an action of contract is brought in one of Her Majesty's superior Courts of record to recover a sum not exceeding 20*l.*, and the defendant in the action suffers judgment by default, the plaintiff shall recover no costs, unless upon an application to such Court, or to a Judge of one of the superior Courts, such Court or Judge shall otherwise direct." The learned Judge, without expressing any opinion, referred the parties to the Court.

Gray now moved for a rule to show cause why the plaintiff should not have his costs. He submitted that the obvious meaning of the 30th section of the 19 & 20 Vict. c. 108, although there had been no decision upon it, was, that, where a plaintiff obtains judgment *422] by default for a sum not exceeding 20*l.*, the Judge should have power to make an order for costs under such circumstances as would have induced him to make the order under the former statutes (a) where the plaintiff on a trial had obtained a verdict for a sum not exceeding 20*l.*

ERLE, C. J.—The legislature, in making the provision in question, assumed that the Judge would make an order for costs upon a judgment by default in an action of contract for a sum not exceeding 20*l.* under the same circumstances as those under which he would have done so in case of a recovery by verdict. I think the plaintiff is

(a) See 13 & 14 Vict. c. 61, ss. 11, 12, 13, and 15 & 16 Vict. c. 54, s. 4.

entitled to his costs. But, in order to save useless expense, the plaintiff had better apply to my Brother Willes at Chambers, with an intimation of our opinion.

The rest of the Court concurring, No rule was granted.(a)

(a) The application was afterwards renewed at Chambers, and an order made.

*DANBY v. LAMB. Nov. 13.

[*423

The 34th section of the Common Law Procedure Act, 1860, which empowers the Judge to certify to deprive the plaintiff of costs where he recovers a verdict for less than 5*l.* in an action "for an alleged wrong," does not apply to *detinue*.

The 43 Eliz. c. 6, s. 2, is still in force in actions upon promises.

THIS was an action of *detinue* for paper-writings with the common money counts.

The defendant paid one shilling into Court on the count in *detinue*, and 162*l.* 9*s.* 7*d.* on the money counts.

At the trial, before Erle, C. J., at the sittings at Westminster after last Term, a verdict was found for the plaintiff on the count in *detinue*, with 1*s.* damages (in addition to the 1*s.* paid into Court), and for the defendant on the other counts: and the learned Judge immediately after the trial endorsed on the record a certificate in the following form:—"I certify that this action was not brought to try a right, and that the action was not proper to be brought."

On the taxation of costs, the master allowed the defendant the costs of the issues found for him, to the amount of 61*l.* 1*s.*, and disallowed the plaintiff the costs of the issues found for her, from the time of the payment of money into Court, by reason of the above certificate, although it was objected on her part that the certificate was inoperative as not being warranted by the 34th section of the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126.(a)

*A summons was afterwards taken out before Erle, C. J., for a review of the taxation, on the ground that the certificate [*424 was inoperative. His lordship referred it to the Court; whereupon

Lucius Kelly moved for a rule nisi to the same effect.—The 34th section of the Common Law Procedure Act, 1860, does not apply to *detinue*, which is an action *ex contractu*: Bro. Abr. *Joinder in Action*, pl. 97. Trover and *detinue* cannot be joined: *Kettle v. Bromsall*, Willes 120,—trover being an action for damages, and *detinue* for the chattels themselves: Fitz. N. B. 138 A. [ERLE, C. J.—In *Mills v. Graham*, 1 N. R. 140, *detinue* and trover were joined.] In one sense, every action is for a wrong; but not in the sense in which the word is used in this statute.

(a) Which enacts, that, "when the plaintiff in any action for an alleged wrong, in any of the superior Courts, recovers by the verdict of a jury less than 5*l.*, he shall not be entitled to recover or obtain from the defendant any costs whatever in respect of such verdict, whether given upon any issue or issues tried, or judgment passed by default, in case the Judge or presiding officer before whom such verdict is obtained shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was not really brought to try a right besides the mere right to recover damages, and that the trespass or grievance in respect of which the action was brought was not wilful and malicious, and that the action was not fit to be brought."

Hance showed cause in the first instance.—This is substantially an action for “an alleged wrong” within the statute, the words of which were intended to have a larger application than those of Lord Denman’s Act, 3 & 4 Vict. c. 24, s. 2. To entitle the plaintiff in detinue to succeed, there must be a wrongful detention of the thing sought to be recovered. [BYLES, J.—Do you find any authority to show that detinue has ever been classed with torts? WILLIAMS, J.—In *Gledstane v. Hewitt*, 1 C. & J. 565, 570,† 1 Tyrwh. 415, 1 Price P. C. 71. Bayley, B., says: “The action of detinue is an action of wrong.” BYLES, J.—That case is cited in *Walker v. Needham*, 4 Scott N. R. 222, 1 Dowl. N. S. 220, where it was held that detinue, where the value of the chattel sought to be recovered, and endorsed on the writ of *425] summons, is under 20*l.*, is triable by the sheriff, under the 3 & 4 W. 4, c. 42, s. 17.] Assuming detinue not to be within the 34th section of the 23 & 24 Vict. c. 126, the certificate may be amended by making it a certificate under the 43 Eliz. c. 6, s. 2, it being competent to the Judge to give that certificate any time before final judgment is actually signed.(a) [BYLES, J.—How can an action in which the plaintiff has recovered 162*l.* be said to be frivolous?]

ERLE, C. J.—Upon the facts which were proved before me at the trial, I was of opinion, that, if the law allowed it, the defendant was entitled to a certificate to deprive the plaintiff of costs. The declaration consisted of a count for money received by the defendant to the use of the plaintiff, upon which the defendant paid into Court 162*l.* 9*s.* 7*d.*; and there was a count in detinue for papers, on which 1*s.* was also paid into Court. The jury found that enough had been paid in under the money count, and that one document had been detained in respect of which the plaintiff was entitled to 1*s.* damages beyond the sum paid into Court. The question is, whether, under these circumstances, I had power to certify to deprive the plaintiff of costs, under the 34th section of the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126. I am of opinion that I had not,—that that section does not empower the Judge to deprive the plaintiff of costs where he recovers a verdict for less than 5*l.* in an action of detinue. The words of the earlier part of the section are,—“When the plaintiff in any *426] action for an alleged wrong, in any of the *superior Courts,” &c. I must confess I was inclined to put a wide construction upon the words “alleged wrong.” A party who wilfully detains the goods of another, in some sense commits a wrong: and, although the action of detinue has always been classed amongst actions *ex contractu*, I should have thought the power to certify was extended to that form of action, were it not that the whole purview of the section seems to be directed to the case where damages alone are sought to be recovered by way of compensation for a wrong. The section goes on,—“he shall not be entitled to recover or obtain from the defendant any costs whatever in respect of such verdict, whether given upon any issue or issues tried, or judgment passed by default, in case the Judge or presiding officer before whom such verdict is obtained shall immediately after-

(a) See *Holland v. Gore*, 3 T. R. 38, n., *Swinerton v. Jervis*, 2 Tidd’s Pr. 1004, 3 East 47. n., *Foxall v. Banks*, 5 B. & Ald. 536 (E. C. L. R. vol. 7), *Woolley v. Whitby*, 2 B. & C. 580 (E. C. L. R. vol. 9), 4 D. & R. 147 (E. C. L. R. vol. 16), *Johnson v. Stanton*, 2 B. & C. 621, 4 D. & R. 156: and see per Parke, B., in *Morgan v. Thorne*, 7 M. & W. 400,† 9 Dowl. P. C. 223.

wards certify on the back of the record, or on the writ of trial or writ of injury, that the action was not really brought to try a right *besides the mere right to recover damages*," &c. It seems to me, therefore, that the legislature did not intend to comprise within this enactment the case of a party seeking to recover something besides damages. Here, by the Common Law Procedure Act, 1854, s. 78, the plaintiff may have judgment to recover the chattel itself. I cannot therefore say that this is an action brought merely to recover *damages* for the wrong. Consequently I had no authority to give the certificate I did. Then, it is said that I may still certify under the 43 Eliz. c. 6, s. 2. But detinue is clearly in form an action *ex contractu*, and at the time of the passing of that Act was commonly joined with debt. Suppose, in the time of Elizabeth, a sum of 162*l.* 9*s.* 7*d.* had been paid into Court in an action of debt and detinue, and the plaintiff had recovered a verdict for 1*s.*,—could the Judge have certified that the action was a frivolous and vexatious one, although the *plaintiff had recovered 162*l.* 9*s.* 7*d.* upon one count, and 1*s.* upon the other? Clearly [427 he could not. I think Mr. *Kelly* is entitled to his rule.

WILLIAMS, J.—I am quite of the same opinion. It appears from the judgment of Bayley, B., in *Gladstone v. Hewitt*, that, notwithstanding detinue is classed amongst actions *ex contractu*, the gist of the action is the wrongful detainer.^(a) I should, therefore, have had no difficulty in holding the word "wrong" to include detinue, if, looking at the rest of the section, such a construction could be considered to be compatible with the apparent intention of the legislature. I agree, however, with my Lord in thinking that the contrary appears. The legislature in the 34th section of the 23 & 24 Vict. c. 126, speaks of actions which are the subject of the enactment as actions wherein the exclusive object of the plaintiff is the recovery of damages. That section, therefore, can have no application to an action of detinue, the object of which is to recover the chattel detained as well as damages for the wrongful detention. The certificate, which professed to be founded upon that statute, can have no operation. As to the rest, I concur with my Lord in thinking that this was not a case in which a certificate could have been granted under the statute of Elizabeth.

BYLES, J.—I also am of opinion that the rule should be absolute for a review of the taxation in this case. According to all the authorities, from Brooke's Abridgment, *Joinder in Accion*, pl. 97, down to the case of *Walker v. Needham*, 4 Scott N. R. 222, 1 Dowl. N. S. 220, detinue has always been considered to be an action *ex contractu*. Now, the 34th section of the Common Law Procedure [428 Act, 1860, in addition to the use of the words "*alleged wrong*" in the earlier part, speaks in the latter part of "*the trespass or grievance in respect of which the action was brought.*" It seems to me, therefore, to be clear that an action of detinue, which is not and cannot properly be called an action for the recovery of damages, does not fall within the meaning of the section. Then, as to the statute of Elizabeth,—which no doubt is still in force with regard to actions on promises: see *Townsend v. Syms*, 2 Car. & K. 381 (E. C. L. R. vol. 61); *Richards v. Bluck*, 6 C. B. 443 (E. C. L. R. vol. 60), 6 D. & L. 334.^(b) The pro-

(a) See *Clossman v. White*, 7 C. B. 43 (E. C. L. R. vol. 62).

(b) In *Richards v. Bluck*, which was an action of covenant on a farming lease, the defendant

fessed object of that statute was, to avoid trifling and frivolous suits. Its title is "An Act to avoid trifling and frivolous suits in law in Her Majesty's Courts in Westminster." The preamble is,—“For avoiding the infinite number of small and trifling suits commenced or prosecuted against sundry Her Majesty's good and loving subjects in Her Majesty's Courts at Westminster (which by the due course of the laws of this realm ought to be determined in inferior Courts in the country), to the intolerable vexation and charge of Her Majesty's subjects,” be it enacted, &c. It is plain, therefore, that this statute strikes at frivolous and vexatious suits, in the sense of their being brought for the recovery of small sums of money, and nothing else. By this action the plaintiff sought to recover, and did recover, the large sum *429] of 162*l.* 9*s.* 7*d.* upon the money *count. It is clearly not a case for a certificate under the statute of Elizabeth.

KEATING, J., was engaged in the Divorce Court.

Rule absolute.(a)

paid 10*l.* into Court upon one breach (which sum was accepted), and the plaintiff recovered a verdict in respect of another breach, with 1*s.* damages. The Judge certified under the 43 Eliz. c. 6, s. 2, “that the jury in this cause found a verdict for 1*s.* and no more:” and the Court held that, notwithstanding this certificate, the plaintiff was entitled to costs.

(a) As to the form of the certificate under the 23 & 24 Vict. c. 126, s. 34, see *Saunders v. Kirwan*, 10 C. B. N. S. 514 (E. O. L. R. vol. 100), and *Gooding v. Britnell*, ante, p. 148.

SEARLE v. LINDSAY and Others. Nov. 22.

A master is not responsible for an injury occasioned to a servant by tackle defective through the neglect of a fellow-servant, if there be no negligence or want of care on the part of the master, either as respects the providing of proper machinery, or the competency of the servant.

The plaintiff was engaged as third engineer on board a steam-vessel of which the defendants were the owners, and, whilst employed with others under the orders of the chief engineer turning a winch, one of the handles came off in consequence of the machine being through the neglect of the chief engineer in a defective and unsafe condition, and the plaintiff was seriously injured,—Held, that the owners were not liable.

THIS was an action against shipowners for an injury occasioned to the plaintiff, an engineer on board their vessel, through the insufficiency and defective state of the machinery.

The first count of the declaration stated that the defendants were possessed of a certain steamship or vessel called the *Ireland*, and the plaintiff for certain hire and reward therefor to be paid to him agreed with the defendants to serve and do the work and duties of third engineer on board the said vessel during a certain voyage from Portsmouth to Kurrachee, and back to England; and that the defendants undertook to provide the said ship or vessel with good and sufficient machinery and apparatus necessary for the purpose of working and navigating the said vessel during the said voyage, and to secure and fasten well and sufficiently the same for the purposes aforesaid; and *430] thereupon the plaintiff entered on board the said vessel, and upon the terms aforesaid; yet the defendants did not provide the said vessel with good and sufficient machinery and apparatus for the purpose of navigating and working the said vessel during the said voyage, and did not well and sufficiently secure and fasten the said

machinery and apparatus then on board the said vessel, whereby and in consequence of which the plaintiff, who was working at the winch on board the said vessel during the said voyage, was severely bruised, hurt, and wounded, and was permanently injured, and rendered unfit for work, and incurred great expense and loss of time in endeavouring to be cured of the said injuries.

The second count stated that the plaintiff was employed by the defendants to do the work and duties of third engineer upon and about the machinery and apparatus on board the defendants' said steamship or vessel called the *Ireland*, to be used for the purpose of working and navigating the said vessel during a voyage from Portsmouth to Kurrachee and back to England, which said machinery and apparatus were, by the negligence and default of the defendants, constructed unsafely and with defective and improper materials, and were in an unsafe condition and unfit for the purposes of working and navigating the said vessel during the said voyage as aforesaid, which the defendants well knew, but of which the plaintiff was ignorant; and, by reason of the premises, whilst the plaintiff was so employed as such engineer as aforesaid, working at the said apparatus on board the said vessel during the said voyage as aforesaid, one of the handles of the winch belonging to the said apparatus came off, and thereby and in consequence thereof the plaintiff was severely bruised, hurt, and wounded, and was permanently injured, and rendered unfit for work, &c., &c.

*The defendants pleaded,—first, to the first count in the declaration, that they did not promise and undertake as [*431 alleged,—secondly, to the first count, that they did not break their promise and undertaking, as alleged,—thirdly, to the second count, not guilty. Issue thereon.

The cause was tried before Erle, C. J., at the sittings in Middlesex after last Trinity Term. The facts which appeared in evidence were as follows:—In September, 1857, the plaintiff shipped as third engineer on board a steam-vessel called the "*Ireland*," of which the defendants were the owners, for a voyage from Portsmouth to Kurrachee and back to England. The screw of the *Ireland* was put into gear by means of a patent winch, which required six men to work it,—three at each handle. In the course of the voyage out, whilst the plaintiff and others (amongst whom were two soldiers) were at the winch, one of the handles came off in consequence of the want of a nut or pin to secure it, and the result was that the men at the other handle were overpowered, and one of them (the plaintiff) grievously injured. The chief engineer on board was a person named Simpson, who was admitted to be a competent workman. It was his duty to see that the machinery (which was in proper condition at the commencement of the voyage) was kept in order; and his attention had been called to the state of the winch several times, but he had omitted to remedy the defect.

On behalf of the defendants, it was submitted that there was no negligence or breach of duty on their part, and that they were not responsible to the plaintiff for the negligence of a fellow-workman.

His Lordship was of opinion that the objection was well founded, and accordingly directed a nonsuit to be entered,—reserving leave to

*432] the plaintiff to move to *set aside the nonsuit and enter a verdict for an agreed sum, if the Court should think that the evidence entitled him to succeed.

Petersdorff, Serjt., on a former day in this term, obtained a rule nisi accordingly.

Lush, Q. C., and *Le Fevre*, now showed cause.—There was no evidence to charge the defendants in this case with the consequences of this unfortunate accident. There is no warranty, arising out of the relation of owner and seaman, of the seaworthiness of the vessel or of the sufficiency of all the machinery or appliances on board: *Couch v. Steel*, 3 Ellis & B. 402 (E. C. L. R. vol. 77). This is simply the case of an injury sustained by a servant or workman through the negligence of a fellow-workman. The authorities are numerous to show, that, in such case, the master is not responsible where he has exercised ordinary care in the selection of his servants and in providing proper machinery. In *Priestley v. Fowler*, 3 M. & W. 1,† which was an action by a servant for an injury sustained by the breaking down of a van in consequence of its having been overloaded by a fellow-servant, Lord Abinger, in delivering the judgment of the Court, says: "The mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information, and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself: and in most of the cases in which danger may be incurred, if not in all, he is just as likely to *433] be acquainted *with the probability and extent of it as the master. In that sort of employment, especially, which is described in the declaration in this case, the plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford." The doctrine there laid down has been affirmed by many subsequent decisions, amongst others, by *Hutchinson v. The York, Newcastle, and Berwick Railway Company*, 5 Exch. 343,† *Wigmore v. Jay*, 5 Exch. 354, *Tarrant v. Webb*, 18 C. B. 797 (E. C. L. R. vol. 86), *Roberts v. Smith*, 2 Hurlst. & N. 213,† and *Ormond v. Holland*, Ellis B. & E. 102 (E. C. L. R. vol. 96). In *Tarrant v. Webb*, *Jervis*, C. J., says: "The rule is now well established, that no action lies against the master for the consequences to a servant of the mere negligence of his fellow. That, however, does not negative liability in every case. The master *may* be responsible where he is personally guilty of negligence: but certainly not where he does his best to get

competent persons. He is not bound to warrant their competency." And in *Roberts v. Smith*, Willes, J., expressly desired it might be understood that the Exchequer Chamber ordered a new trial "upon the ground that there appeared to have been evidence of the personal interference and negligence of the master." The same principle is laid down by the *House of Lords in the case of *The Bartonshill Coal Company v. Reid*, 3 Macqueen 266, where Lord Cranworth, C., says: "With reference to the law of England, I think it has been completely settled, that, in respect of injuries occasioned to one of several workmen engaged in a common work (and I know of no distinction whether the work be dangerous or not dangerous), the master is not responsible if he has taken proper precautions to have proper machinery and proper servants employed. When I say it is settled, I mean only as far as it can be settled without having been brought by writ of error to any superior Court. The principle of the law of England I take to have been enunciated in the case of *Hutchinson v. The York, Newcastle, and Berwick Railway Company*, 5 Exch. 349,† and to have gone upon this,—that, so far as persons external to the master and his servants are concerned, the master is to be considered as responsible for every one of those servants; and the person who receives an injury is not bound to inquire whether that injury has resulted from one sort of miscarriage or another: the master is the person to whom, on general principles, he is entitled to look; so far as he is concerned, he is externally the whole, and the whole is considered as one body united in the master. But the case is different when the question arises within the circle of the master and servants. The law of England considers that the person who undertakes the service undertakes it knowing that he is liable to injury as well from accidents that cannot be guarded against, as from neglect or mismanagement on the part of those who are engaged with him in the common occupation. The Court of Exchequer came to the conclusion that the principle which makes the master liable to complaints made ab extra, does not make him liable to complaints arising intra the whole body, consisting of himself and *his workmen. I take that to be established, unless, upon further consideration in this House, the House should come to [*435 the opinion that that has been wrongly laid down." And, when the case came before the House on a subsequent occasion, the same learned Lord, who had then ceased to be Chancellor, in delivering his opinion, said: "A large portion of the ordinary acts of life are attended with some risk to third persons, and no one has a right to involve others in risks without their consent. This consideration is alone sufficient to justify the wisdom of the rule which makes the person by whom or by whose orders those risks are incurred responsible to third persons for any ill consequences resulting from want of due skill or caution. But, do the same principles apply to the case of a workman injured by the want of care of a fellow-workman engaged together in the same work? I think not. When the workman contracts to do work of any particular sort, he knows, or ought to know, to what risks he is exposing himself: he knows, if such be the nature of the risk, that want of care on the part of a fellow-workman may be injurious or fatal to him, and that against such want of care his employer

cannot by possibility protect him. If such want of care should occur, and evil is the result, he cannot say that he does not know whether the master or the servant was to blame. He knows that the blame was wholly that of the servant. He cannot say the master need not have engaged in the work at all; for, he was party to its being undertaken. Principle, therefore, seems to me opposed to the doctrine that the responsibility of a master for the ill consequences of his servant's carelessness is applicable to the demand made by a fellow-workman in respect of evil resulting from the carelessness of a fellow-workman when engaged in a common work. That this is the view *436] of the subject in England, *cannot, I think, admit of doubt.

It was considered in the Court of Exchequer in *Priestley v. Fowler*, 3 M. & W. 1,† afterwards fully discussed in the same Court in *Richardson v. The York, Newcastle, and Berwick Railway Company*, 5 Exch. 343,† and acted on by the same Court in *Wigmore v. Jay*, 5 Exch. 354.† Those decisions would not, it is true, be binding on your Lordships, if the ground on which they rested were unsound; but the circumstance of their having been acquiesced in affords a strong argument to show that they have been approved of: more especially as in the first two cases the question appeared on the record, and might therefore have been brought before a Court of Error." It is impossible for the owner of a ship to guard himself against negligence of this sort. Every man on board knows that he must trust to the skill and care of his shipmates: their want of care is part of the risk he takes upon himself. Here, the defendants had employed as chief engineer a man whose competency was never questioned. What more could they do? Besides, the plaintiff was himself an engineer. [WILLIAMS, J.—It does not appear that he had notice of the defective state of the winch.] Its condition was apparent.

Petersdorff, Serjt., and *Morgan A. McDonnell*, in support of the rule.—There were essential materials which should have been submitted to the jury, and which might in all probability have produced a different result. There clearly was evidence for the jury that the machine which caused the injury to the plaintiff was not in a proper condition at the commencement of the voyage. The plaintiff's case is rested upon the proposition laid down by Lord Cranworth in *The Bartonhill Coal Company v. Reid*, 3 Macq. 266, as the result of a careful review of all the authorities upon the subject,—“Servants must be supposed *437] to have the *risk of the service in their contemplation when they voluntarily undertake it and agree to accept the stipulated remuneration. If, therefore, one of them suffers from the wrongful act or carelessness of another, the master will not be responsible. *This, however, supposes that the master has secured proper servants, and proper machinery for the conduct of the works.*” The turning of the winch-handle was not properly part of the plaintiff's duty: but, having been ordered to do it, he had no alternative but to obey. The rule of law which is relied on by the defendants does not apply where the parties ordered are children or inexperienced persons. Here, two of the persons set to do this work were soldiers. [WILLIAMS, J.—Where do you find it laid down that that is the principle upon which the non-liability of the master for an injury to a servant from the negligence of a fellow-servant, is founded?] It is an element in the propo-

sition. The cases of *Paterson v. Wallace*, 1 Macq. 748, and *Bryden v. Stewart*, 2 Macq. 80, are strong authorities in favour of the plaintiff. In the former it was laid down that a master is bound to take all reasonable precautions to secure the safety of his workmen, more especially if the work be of a dangerous character, and the persons engaged proverbially reckless: and the same principle was enunciated in the latter case. This is not simply the case of a man receiving an injury from the carelessness or negligence of a fellow-workman; for, here, the negligence was that of the plaintiff's superior officer, whose orders he was bound by the ship's articles to obey. He was not, therefore, a volunteer.

WILLIAMS, J.—I am of opinion that there was no misdirection in this case. I think there was no foundation for the argument that Simpson, the chief engineer of the vessel, and the plaintiff, stood in any *other relation towards each other than that of ordinary [*438 fellow-servants. Then, applying the rule of law which is now firmly established, the common employer is not liable to either for an injury sustained through the negligence of the other. In order to take this case out of the ordinary rule, it was contended that here there was evidence of negligence on the part of the employers themselves. In order to make that out, there must be reasonable evidence to show that they were to blame either in respect of their not having provided proper machinery and appliances, or not having retained competent workmen. I do not find any evidence at all of any default in either of these particulars. If the winch was out of order, it was owing to Simpson's negligence. There was no evidence, nor any suggestion, that Simpson was not a perfectly competent engineer.

BYLES, J.—I am of the same opinion. I observe that the first count of the declaration alleges an undertaking on the part of the defendants to provide good and sufficient machinery and apparatus necessary for the purpose of navigating the vessel during the voyage; and the second count states that the machinery and apparatus were by the negligence and default of the defendants constructed unsafely and with defective and improper materials, and that the defendants knew it. I am unable to discover any evidence to go to the jury in support of either of these counts. Turning to the opinion given by Lord Cranworth in the case of *The Bartonshill Coal Company v. Reid*, 3 Macq. 266, I find his Lordship thus lays down what he conceives to be the result of the authorities,—“The law of England considers that the person who undertakes the service undertakes it knowing that he is liable to injury as well from accidents that cannot be guarded against as *from neglect or mismanagement on the part of those who are engaged with him in the common occupation. The Court [*439 of Exchequer came to the conclusion that the principle which makes the master liable to complaints made *ab extra*, does not make him liable to complaints arising *intra* the whole body, consisting of himself and his workmen. When a master employs his servant in a work of danger, he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition, so as to protect the servant against unnecessary risks.” That is the extent of the master's responsibility. The obligation the law casts upon him, is, to take due and proper care that his machinery is sufficient and his

workmen reasonably competent. Here, the obligation sought to be imposed on him is, that of a warranty. There is no evidence here of any cause of action arising out of the breach of any duty imposed by law upon the defendants. I cannot entertain a doubt that the direction of my Lord to the jury was quite right; and, upon the facts proved and admitted, it seems to me to be quite impossible to amend the record so as to disclose a good cause of action.

KEATING, J.—I am of the same opinion. The facts appear to me to bring the case precisely within the principle which has been established by a long series of authorities beginning with *Priestley v. Fowler*, 3 M. & W. 1,† viz., that a master is not liable for an injury resulting to his servant from the negligence of a fellow-servant, where there has been no negligence or want of due care on the part of the master in providing competent machinery and apparatus, or in employing competent workmen. A master is by law bound to provide proper and efficient machinery and reasonably competent workmen. *440] Was there any evidence of any *failure of that duty on the part of the defendants in this case? It is conceded that there was none as to the servant they employed. And, assuming that the winch required something to be done to it to put it in a state to render it safe, the defendants had on board their vessel a competent chief engineer whose duty it was to see it done, and who did so, though unfortunately too late. It is also not unworthy of notice that the plaintiff himself was an engineer; and knew the danger of working the winch in its imperfect state. The highest authority known to our law,—the House of Lords,—has laid down the rule in a manner which excludes the defendants from liability in this case. If it were otherwise, the responsibility of the owners of ships, and especially of steam-vessels, would be beyond all limit. Although I deeply commiserate the serious disaster which has befallen the plaintiff, I think my Lord could not have, consistently with the law, taken any other course than he did.

ERLE, C. J.—I entirely concur in the judgment which has been delivered by my three learned Brothers. The conclusion of law was most reluctantly forced upon me at the trial, and now. I do not remember a case that ever made me more desire that the plaintiff should have some compensation for the very terrible calamity which he sustained. The rule must be discharged.

Rule discharged.(a)

(a) The Scotch law upon this subject is well illustrated by the judgment of Lord Cockburn in *Dixon v. Rankin*, 14 Sess. Cas. 480. In an action of damages against the proprietor of a coal-pit, at the instance of the widow of a workman who had been killed by an accident, the Court repelled the defence that no liability could attach to the defender, the accident having been occasioned by the negligence of *fellow-workmen in the same service, for which *441] a master was not responsible. Lord Cockburn says: "I need not enter into the details of the proof. It is sufficient to say that I agree with the two sheriffs and the lord ordinary in their view of the facts. The result is, that the pursuer's husband lost his life through blameable negligence on the part of those for whom the defender is liable. But it has been maintained, and this is the only singularity of the case, that, as the deceased was himself a workman at this colliery, and was injured through the culpable misconduct of other workmen there, the defender, who employed them all, is not liable in damages. This plea rests solely on the authority of two or three very recent decisions of English Courts (referring to *Priestley v. Fowler*, 3 M. & W. 1,† *Hutchinson v. The York, Newcastle, and Berwick Railway Company*, 5 Exch. 343,† and *Wigmore v. Jay*, 5 Exch. 354†). And these decisions certainly do seem to

determine, that, in England, where a person is injured by the culpable negligence of a servant, that servant's master is liable in reparation, provided the injured person was merely one of the public; but that he is not so responsible if the person injured happened to be a fellow-workman of the delinquent servant. It is said, as an illustration of this, that, if a coachman kills a stranger by improper driving, the employer of the coachman is liable; but that he is not liable if the coachman only kills the footman. If this be the law of England, I speak of it with all due respect. But it most certainly is not the law of Scotland. I defy any industry to produce a single decision, or dictum, or institutional indication of opinion, or any trace of any authority, to this effect, or of this tendency, from the whole range of our law. If such an idea exists in our system, it has as yet lurked undetected. It has never been directly condemned, because it has never been stated. The case of *Sword v. Cameron*, 1 Sess. Cas. 493, gave the Court a fair opportunity of applying the principle if it existed; for, there it was a workman who had been hurt by the negligence of his fellow-workers, but the employer was found liable. Many similar cases have occurred, and they have all been disposed of without the interference of this conception. The whole course of our practice has proceeded on the assumption that the liability of an employer did not cease merely because, besides employing the wrongdoer, he also employed him to whom the wrong was done. I am clear for adhering to our own rule, and to our own legal and practical habits. The new rule seemed to be recommended to us, [*442 not only on account of the respect due to the foreign tribunal,—the weight of which we all acknowledge,—but also on account of its own inherent justice. This last recommendation fails with me, because I think that the justice of the thing is exactly in the opposite direction. I have rarely come upon any principle that seems less reconcilable to general legal reason. I can conceive some reasons for exempting the employer from liability altogether; but not one for exempting him only when those who act for him injure one of themselves. It rather seems to me that these are the very persons who have the strongest claim upon him for reparation, because they incur damage on his account, and certainly are not understood by our law to come under any engagement to take these risks on themselves."

See observations on the conflict between the English and the Scotch law on this subject, in the Introduction to Hay's Digest of Decisions on the Liability of Masters and Servants for Negligence, p. xxiii. et seq.

The same rule has been very generally adopted in this country; but in the case of *The Railroad Co. v. Stevens*, 20 Ohio 435, the Company was held liable for an injury to the engineer, caused by the negligence of the conductor of the train, who stood to him "in the relation of a superior." This distinction (which was adopted also in *Chamberlain v. The Railroad*, 11 Wis. 238) is considered perfectly sound by the annotator of *Wilson v. Peverly*, 1 Am. L. C. 648 (4th ed.), but was rejected in *Ryan v. The Railroad*, 11 Harris (Pa.) 884. It is, however, not sufficient to exempt the master from liability, if the accident was caused by the want of the proper safeguards—as a fusible safety-plug to a boiler—that the negligence of another servant contributed to the result, or that it might have been prevented by his vigilance: *Cayzer v. Taylor*, 10 Gray 274; but in *Seaver v. Railroad*, 14 Gray 466, the Court declined to express an

opinion as to whether "a railroad corporation are bound to use reasonable care, in furnishing a suitable safe engine and car, in favour of a person employed by them," and carried over their road without payment of fare, though the better opinion seems to be that the master is bound to use proper care in selecting his servants and providing machinery, as in *Buzzell v. Manufacturing Co.*, 48 Maine 113, where it was held the duty of the employer to provide suitable bridges or ladders necessary to be used by his servants in going to or returning from labour.

Of course if the plaintiff's own negligence contribute to the accident he cannot recover, as in *Frazier v. The Railroad Co.*, 2 Wright (38 Pa. St. R.) 104, where the judgment of the Court below was reversed because of a refusal to instruct the jury that "if the plaintiff (who was a brakeman), knew that his conductor was habitually careless, and chose to continue in service with him,

and did not inform the Company of his known acts of carelessness and refuse to serve with him, he can have no claim against the Company for injuries suffered from further carelessness, even if the Company did also know." See also Redfield on Railways, section 170, p. 386, *et seq.*

In the Matter of an Arbitration between ELIAS UNDERWOOD and
The BEDFORD and CAMBRIDGE RAILWAY COMPANY.
Nov. 23.

It is highly improper,—though not *per se* a ground for setting aside his award,—for an arbitrator to employ the attorney of one of the parties to the reference (though his own attorney also), to assist him in framing the award.

THIS was a reference under the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18. The Bedford and Cambridge Railway Company requiring certain land belonging to Mr. Underwood, gave him the notices under the Act. Mr. Underwood demanded 250*l.* by way of compensation. The Company offered him 150*l.*, which he declined to accept, and an arbitrator was appointed. The arbitrator awarded the claimant 200*l.*

Mellor, Q. C., on behalf of the Company, on a former day in this term, obtained a rule calling upon Underwood to show cause why the award should not be set aside, on the ground of misconduct on the part of the *arbitrator (a layman), in this that he consulted and *443] was attended by one Barker, the attorney of Underwood (who was also the private solicitor of the arbitrator) in reference to his award, in the absence of the Company's agent, and that the award was prepared by Barker, who had acted on the reference as the advocate and attorney of Underwood. He referred to *Walker v. Frobisher*, 6 Ves. 70, *Fetherstone v. Cooper*, 9 Ves. 67, *Dobson v. Groves*, 6 Q. B. 637 (E. C. L. R. vol. 51), *The Queen v. The Justices of Hertfordshire*, 6 Q. B. 753, and *Proctor v. Williams*, 8 C. B. N. S. 386 (E. C. L. R. vol. 98). The affidavits on which the rule was obtained stated that the arbitrator claimed 10*l.* 11*s.* 2*d.* (exclusive of 5*l.* 5*s.* for his fee as arbitrator) as the costs of the reference and award, sending in to the Company a bill of particulars which included various charges made by Barker for attendances on him in the matter, and for acting as his adviser at the reference and also the costs of Barker in preparing the award for him. It was sworn that these attendances by Underwood's attorney were in the absence of any professional assistance on behalf of the Company, who were merely represented by their surveyor.

Lush, Q. C., and *R. E. Turner*, now showed cause, upon an affidavit by the arbitrator, in which he positively denied that he had ever received any advice or assistance from or had any communication with Barker on the subject of the reference before he had fully made up his mind as to the sum he would award to Underwood.—There is nothing to justify the notion that the arbitrator has acted culpably in this matter. Some suspicion was perhaps naturally excited by the fact of the attorney's charges for aiding him in putting his award into a formal shape being mixed up with the arbitrator's charge. But it is *444] perfectly competent to *an arbitrator, after he has made up his mind as to what his award shall be, to employ an attorney to

put it into proper form: and it is no ground of objection that the person so employed happens to be the attorney of one of the parties to the reference. None of the cases referred to have any material bearing upon the present. In *Walker v. Frobisher*, 6 Ves. 70, the arbitrator had received evidence from one of the parties, unknown to the other, after he had given notice that he would hear no more: *Fetherstone v. Cooper*, 9 Ves. 67, carries the matter no further. And *Dobson v. Groves*, 6 Q. B. 637 (E. C. L. R. vol. 51), merely decides, that, where an arbitrator questions a witness and receives statements from him in the absence and without the consent of one of the parties to the reference, the Court will set aside the award, without taking into consideration the nature of the statements or the probability of their having influenced the decision. [ERLE, C. J.—It would vitiate the award, no doubt, if the attorney had been taken into his counsel before the arbitrator had made up his mind. But, if the fact of prior communication is negatived, the ground of the rule fails. I very much disapprove of an arbitrator consulting the attorney of one of the parties to the reference as to the form of his award. To say the least of it, it is an extremely imprudent thing. But I am not prepared to say that it is ground for setting aside the award, if the arbitrator had previously fully made up his mind as to the substance of his award, and merely consulted the attorney upon the framing of it.] The affidavits show distinctly that the arbitrator here had made up his mind fully before he consulted Barker as to the drawing of the award.

Mellor, Q. C., and C. Pollock, in support of the rule.—The conduct of an arbitrator should be free from suspicion. It is impossible to measure the influence upon his mind of ex parte statements. In *Walker v. Frobisher*, 6 Ves. 70, the affidavit of the arbitrator contained a statement, that, on the 10th February, several persons came into the room where the deponent and the surveyors were, unattended by the solicitors on either side, and did mention some circumstances relative to the matters in dispute, of which he believed he made some minutes, but that they were at the same time told by him that he had previously satisfied his mind on the subject, and that he should proceed to make his award. And Lord Eldon said: "It does not appear to me that the arbitrator has by the award improperly exercised the authority given by the order of reference: but, on account of the transaction that took place on the 10th of February, the award cannot stand. He had examined different witnesses at different times in the presence of the parties. He recommended them not to produce any more witnesses. To that recommendation they accede, and in effect say, 'Upon the view of what is disclosed to you, do what is right between us.' After this, he hears these other persons; and he admits he took minutes of what was said. It did not pass as mere conversation. It does not appear that he afterwards held any communication with the other party, or disclosed what passed to him: but the arbitrator swears it had no effect upon his award. I believe him. He is a most respectable man. But I cannot from respect to any man do that which I cannot reconcile to general principles. A judge must not take upon himself to say whether evidence improperly admitted had or had not an effect upon his mind. The award may have done perfect justice; but, upon general principles, it cannot

stand." The same learned Judge confirms that view in the subsequent case of *Fetherstone v. Cooper*, 9 Ves. 67. Lord Denman in *Dobson v. Groves*, 6 Q. B. 637, 647 (E. C. L. R. vol. 51), adopts the principle laid down by Lord Eldon. "It is clear," *he says, "that the *446] arbitrator held a meeting on the 3d of October for the purpose of making up his mind on one of the subjects referred; and a gentleman was present who had acted as advocate in a former stage of the reference. The arbitrator said that nothing which passed at that meeting would influence his decision: but I think that no information ought to be received at all under such circumstances, unless the arbitrator has an express power reserved for that purpose, or the parties agree that he shall exercise it. The proceeding is quite different from that of consulting a legal friend on the framing of the award: that is legitimate: but here the conference is on something to be done by the consulting party as arbitrator on the matters referred: it turns upon a point in the cause on which a bias may be given to his mind without the possibility of its being removed. The only difficulty arises from the two cases in the Common Pleas: (a) and I will say, without disguise, that I would rather abide by the principle which Lord Eldon lays down in *Walker v. Frobisher* than by those decisions. When once the case is brought within the general principle by a possibility that the arbitrator's mind may have been biassed, there is a sufficient objection." This principle was again acted upon in *The Queen v. The Justices of Hertfordshire*, 6 Q. B. 753 (E. C. L. R. vol. 51), where it was held, that, if any one of the magistrates hearing a case at sessions be interested in the result, the Court is improperly constituted, and an order made in the case will be quashed on certiorari; and that it is no answer to the objection that there was a majority in favour of the decision without reckoning the vote of the interested party, nor that *447] the interested party withdrew *before the decision, if he appear to have joined in discussing the matter with the other magistrates. In a very recent case in this Court, *Proctor v. Williams*, 8 C. B. N. S. 386 (E. C. L. R. vol. 98), the principle was again recognised. The Court there laid it down that they would not sanction an award which had been made *ex parte*,—one of the parties having withdrawn from the reference in consequence of the arbitrator (a layman) insisting, in spite of his protest, on retaining the services of an attorney to assist him at the hearing: and yet there the attorney would have been acting openly in the presence of the parties. Erle, C. J., there says: "It is of the essence of these transactions that the parties should be satisfied that they come before an impartial tribunal. Here is a lay arbitrator chosen by the parties; and he begins with a stipulation that he shall have a lawyer at his elbow to assist him from time to time with his advice. Looking at the way in which Mr. Duignan forced his attendance on the parties after he was objected to by one of them, and at the contradictory reasons by which he sought to justify his presence, I think the defendants were perfectly justified in saying that the tribunal was not the tribunal of their selection, and not a satisfactory one. I think a decision come to by the arbitrator in such a manner as this is not one which a Court of justice ought to force on

(a) *Atkinson v. Abraham*, 1 Bos. & P. 175, and *Bignall v. Gale*, 2 M. & G. 830 (E. C. L. R. vol. 40), 3 Scott N. R. 108, 9 Dowl. P. C. 631.

the parties. I cannot help observing that the gentleman who advised Mr. Yardley (the arbitrator) to adopt the course he did, seems to have a very improper sense of his duty." The whole course of the proceeding here was pregnant with the gravest suspicion: and it would be highly dangerous to allow an award made under such circumstances to stand. A layman must frequently avail himself of professional aid in preparing his award; but he should obtain it from an independent and impartial source, and not from one who has *either acted professionally for either of the parties or has attended the arbitrator professionally in the course of the reference. [*448]

ERLE, C. J.—The course which was pursued by the arbitrator in this case is one which I as a Judge must highly disapprove of, because it gives a just ground for suspicion and dissatisfaction, lest the arbitrator should have permitted himself to be swayed by communications and information received from one side only. But, at the same time, I cannot help saying that it is impossible to have a stronger affidavit than that which has been produced in answer to the rule, that the conclusion at which the arbitrator arrived was come to before he had any consultation with the attorney as to the form of his award. The very fact of the items referring to what passed between the arbitrator and the attorney appearing in the bill of costs, seems to me to be almost conclusive evidence that he was unconscious that he was doing anything wrong. It is, however, a practice which I trust will not be often resorted to. I do not feel justified in going so far as to set aside the award: but I think enough appears to afford a justification to the Company for appealing to the Court, and therefore I think,—and my learned Brothers agree with me,—that the rule should be discharged without costs.

Lush strenuously but unsuccessfully resisted this result.

Rule discharged without costs.

END OF MICHAELMAS TERM.

*449] *IN THE EXCHEQUER CHAMBER.

FREWEN v. PHILIPPS.

The plaintiff and defendant occupied houses adjoining each other as tenants under lease both of which were granted by the same lessor on the same day, viz. the 18th of December, 1788, and both expiring at the same time. The defendant by building on his own premises obstructed a window in the house of the plaintiff, though the latter had had an uninterrupted enjoyment of light and air for more than twenty years:—Held, that the circumstance of the two houses being held under the same landlord, and for the same term, did not prevent the one tenant from acquiring an indefeasible right to light as against the other.

THE declaration stated that for and during all the times thereafter mentioned the plaintiff was, and thence hitherto had been and still was, lawfully possessed of a certain messuage or dwelling-house, with the appurtenances, in which said messuage or dwelling-house during all the time aforesaid there of right were, and still of right ought to be, divers windows through which the light of right ought to have entered, and until the committing of the grievances by the defendant as thereafter mentioned did enter and still of right ought to enter into the said messuage or dwelling-house, for the more convenient use and occupation of the same, without the obstructions thereafter mentioned; yet the defendant wrongfully and injuriously built and erected and raised, and kept and continued a certain conservatory, buildings, and erections near to the said windows, by reason of which premises the light was and is hindered and prevented from coming and entering into or through the said windows into the said messuage or dwelling-house of the plaintiff, and the said messuage or dwelling-house has been and is thereby rendered dark and less fit for habitation, and was and is deteriorated in value, &c.

The defendant pleaded,—first, not guilty,—secondly, that there were and was not divers windows or any window in the said messuage or dwelling-house, through which the light ought to have entered for the *450] *more convenient use and occupation of the same, without the obstruction in the declaration mentioned and alleged. Issue thereon.

At the trial before Erle, C. J., at the sittings in Middlesex after Hilary Term, 1860, the plaintiff proved that his dwelling-house in the declaration mentioned adjoined a tenement and premises of the defendant, which are to the south of the plaintiff's dwelling-house, and that there were and for more than sixty years before the erection of the defendant's conservatory thereafter mentioned had been certain windows in the plaintiff's dwelling-house, at the back thereof, through which a sensible amount of rays of light had during the time aforesaid passed without obstruction over a low part of the defendant's house and premises, until the defendant, in the month of July, 1857, built a conservatory on and over the said low part of his house and premises, and thereby substantially obstructed the passage of light over the said part thereof to the said windows of the plaintiff's said dwelling-house.

The plaintiff also put in two indentures of lease both dated on the 18th of December, 1788, one being the lease whereby and by virtue whereof the plaintiff's said messuage and dwelling-house was and had been held and occupied from the time of the date of the said lease to the times in the declaration mentioned, from and under successive Dukes of Portland, the successive owners in fee and reversioners thereof; and the other being the lease whereby and by virtue whereof the defendant's said tenement, house, and premises were and had been held and occupied from the time of the date of the said lease to the said times in the declaration mentioned, under and from the same successive Dukes of Portland, the successive owners in fee and reversioners thereof.

*These two leases were granted by the same owner in fee, the then living Duke of Portland. The demise in each is for [451 the same term of years; and they are exactly similar to each other as to reservation of rent, and covenants, and in all respects except in the names of the respective lessees, and in the descriptions of the parcels respectively demised by them.

On the part of the defendant it was insisted, that, on the second issue, the Lord Chief Justice should direct the jury to find for the defendant, inasmuch as it appeared from the evidence, and especially from the said leases, that the plaintiff's dwelling-house in the declaration mentioned, and the defendant's tenement, house, and premises on which the obstructions in the declaration mentioned were erected, were and are, and for the whole time mentioned in the evidence had been, the freehold property of the same person, and were and are and for the said whole time had been held under the same estate and title, and were and are, and for the said whole time always had been, parcels of the same estate of the same reversioner, and that the enjoyment of access of light to the plaintiff's said dwelling-house over the defendant's said tenement, house, and premises during the said time was not in the character of an easement, and that the defendant's said tenement house, and premises never became servient to the plaintiff's said dwelling-house and premises, as to access of light.

But his Lordship directed the jury, that, according to the evidence given, the plaintiff had proved a legal right to the access of light to his said dwelling-house without the obstructions in the declaration mentioned, and directed them, if they believed the said evidence, to find for the plaintiff upon the said second issue.

The counsel for the defendant excepted to this ruling.

*The exceptions came on to be argued in the Exchequer Chamber on the 17th of June, 1862, before Pollock, C. B., [452 Crompton, J., Bramwell, B., Blackburn, J., and Wilde, B.

Garth, for the plaintiff in error.—To bring a case within the 8d section of Lord Tenterden's Act, 2 & 3 W. 4, c. 71, (a) the right when acquired by twenty years' uninterrupted user must be absolute and

(a) Which enacts, that, "when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

indefeasible. That cannot be the case where, as here, both the dominant and the servient tenement are held under the same landlord. A right to light cannot be acquired by one tenant against another where both hold under the same landlord, and under leases granted at the same time and determinable at the same time: for, any right which either might acquire as against the other would be defeasible on the expiration of their respective terms. The statute puts the right to light and air on precisely the same footing as any other easement: *Harbidge v. Warwick*, 3 Exch. 552.† It was there held that the 3d section converts into a right such an enjoyment only of access of light over contiguous land as has been had for twenty years in *the character of an easement* distinct from the enjoyment of the land itself; and that the statute places this species of negative easement on the same footing in this respect *as those positive easements provided for by

*453] the other sections: and, consequently, that, if the dominant and servient tenements are during the prescribed period in the occupation of the same person, no right is acquired. In *Bright v. Walker*, 1 C. M. & R. 211,† where a way had been used adversely and under a claim of right for more than twenty years over land in the possession of a lessee who held under a lease for lives granted by the Bishop of Worcester, it was held that this user gave no right, under s. 2, as against the bishop, and did not affect the see. And see Sugden's Real Property Acts 176. If the acquisition of the right is prevented by unity of possession, the same consequence must result from unity of title; for, unless the twenty years' enjoyment gives a good title against all, it gives no good title at all. Both the dominant and the servient tenement will come into the possession of the same person at the same time,—on the expiration of the leases; and the right will necessarily be gone. [BLACKBURN, J.—Not necessarily. The reversions may by sale in the mean time come into the hands of different persons.] The law does not allow the negligence or the connivance of a tenant to affect his landlord's rights, by enabling a third person to acquire a permanent easement over it, which might prevent the landlord from afterwards building on his land: and it would be most unjust if it did.

O'Malley, Q. C., for the defendant in error.—By the twenty years' uninterrupted user, the plaintiff has acquired, as against the defendant, an indefeasible title to the passage of light to his windows. The right to light is acquired by user only: *Moore v. Rawson*, 3 B. & C. 340 (E. C. L. R. vol. 10), 5 D. & R. 234 (E. C. L. R. vol. 16). The cases of *The Salters' Company v. Jay*, 3 Q. B. 109 (E. C. L. R. vol. 43), 2 Gale & D. 414, *Flight v. Thomas*, 11 Ad. & E. 688 (E. C. L. R. vol. 39), 3 P. & D. 442, and *Truscott v. The Merchant Taylors' Company*, 11 Exch. 863,† show that the enjoyment of light and air is not governed by the rules which are applicable to other descriptions of easements.

Garth was heard in reply.

POLLOCK, C. B., delivered the judgment of the Court.—We are all of opinion that the ruling of my Brother Erle at the trial was quite right. The short ground upon which we found our opinion is well expressed by Coleridge, J., in *Truscott v. The Merchant Taylors'*

Company, 11 Exch. 863.† Speaking of the 3d section of the Prescription Act, that learned Judge said: "That section seems to me to simplify and almost new-found the mode of acquiring the right to access of light. It founds it on actual enjoyment for the full period of twenty years without interruption, unless that enjoyment is shown to have been by consent or agreement expressly made by deed or writing,—thus putting the right on a simple foundation, and with the simplest exception." And Cresswell, J., said: "In the course of legislation then and since, parliament has been actuated by a desire to settle titles and rights. One object of the Prescription Act was, to shorten the time by which persons who had the access and use of light could acquire an absolute right to it. The 3d section does not say, 'when the access and use of light shall have been enjoyed *as of right*;' because every person has a right to so much light as can come in at his windows. It is true that his neighbour has a right thus far, that, within twenty years, he may build upon his own land and obstruct the access of light: he does *no wrong, for, within the period of limitation, the other party has no right to have his [*455 windows unobstructed. The Prescription Act brought this to a simple question. It says, that, after twenty years' enjoyment without interruption, the right shall be deemed *absolute and indefeasible*. But it is not so, if another person has a right to obstruct the light: it is interruptable." Although that is not precisely the case now before the Court, yet it recognises the intention of the legislature to adopt a simple and short period for the acquisition of the right to light; and that the enjoyment need not be *as of right*. It may be, that, if a man opens a light towards his neighbour's land, the reversioner may have no means of preventing a right thereto from being acquired by a twenty years' enjoyment, unless he can prevail upon his tenant to raise an obstruction, or is able to procure from the other party an acknowledgment that the light is enjoyed only by consent. For the reasons above stated, however, we think the direction of the Lord Chief Justice was right, although difficulties may be suggested if it be followed out in some possible cases. Judgment affirmed.

*The WOLVERHAMPTON NEW WATERWORKS COMPANY v. HAWKSFORD. Nov. 29. [*456

The time within which by the 9th section of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), a register of shareholders is to be made and sealed, is merely directory; and a register containing the several particulars required by the Act, and *bonâ fide* intended to be a register, may be valid, though sealed at a subsequent period.

Therefore a party may be liable as a *shareholder* for calls, under s. 27, although the register may not have been made and sealed within the time prescribed by s. 9.

THIS was an action brought by the Wolverhampton New Waterworks Company to recover from the defendant the sum of 375*l.*, the amount of six several calls of 12*s.* 6*d.* each upon 100 shares of which

the defendant was alleged to be the holder, and which calls were respectively made on the 2d of September, 1856, the 1st of February, 1857, the 1st of May, 1857, the 1st of September, 1857, the 5th of January, 1858, and the 11th of May, 1858,—with interest on each call at the rate of 5*l.* per cent. per annum from the date of each call until judgment.

The first count of the declaration stated that the defendant was the holder of 100 shares in the Wolverhampton New Waterworks Company, and was indebted to the said Company in 375*l.*, in respect of six calls of 12*s.* 6*d.* each upon each of the said shares, whereby an action had accrued to the said Company, by virtue of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), and the Wolverhampton New Waterworks Act, 1855 (18 & 19 Vict. c. cli.), to demand and have of and from the defendant the sum of 375*l.*: yet the defendant had not yet paid the said sum of 375*l.*, or any part thereof.^(a)

Pleas, never indebted, and that the defendant was not the holder of the said shares, or any of them, as alleged. Issue thereon.

The cause was tried before Erle, C. J., at the sittings at Westminster after last Trinity Term, when the *following evidence was *457] given,—that the plaintiffs were a joint stock Company incorporated by an Act of parliament passed on the 16th of July, 1855 (18 & 19 Vict. c. cli.), in which was incorporated the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16); that, by the 14th section of the first-mentioned Act it was enacted that the first general meeting of the Company should be held within two months after the passing of that Act, and a general meeting of the Company should be held in the month of January in every year, or at such other times as should be from time to time appointed by any general meeting; that no other time than the month of January was ever so appointed; that the shares in the plaintiffs' Company were divided into twenty thousand of 5*l.* each; that one hundred shares were appropriated by the Company for the defendant; that, before the Act was obtained, the defendant executed the subscription contract of the Company for 600*l.*; that the defendant, when he executed the subscription contract, gave to the promoters of the Company a check for 600*l.*, but that after the Act was obtained, this check was returned to him; that the defendant had voted as a proprietor at a meeting of the Company; and that he was the person mentioned in the 7th and 19th sections of the Act.

There was conflicting evidence as to whether the defendant had assented to become a shareholder in the said Company; but the jury found that he had previously to the 1st of January, 1857, assented to become the holder of one hundred shares; and on that point there was no attempt to disturb the verdict.

It was proved that the first general ordinary meeting of the Company was held on the 1st of January, 1857; at which meeting a loose half-sheet of paper was sealed with the seal of the Company, and which was in the following form:—

(a) There was a second count, to which there was a demurrer, upon which judgment was given for the defendant below: 6 C. B. N. S. 336 (E. C. L. R. vol. 95).

*Darlington Street,
Wolverhampton.*

Mr. Henry Beckett	3	2	6	Pd.	5
Mr. J. F. Batesman					200
Mr. James Walker	2	10	0	Pd.	4
Mrs. C. S. Simes					5
Mr. C. F. Clarke					25
Mr. E. York	25	0	0	Pd.	40
Mr. F. R. Griffiths					50
Mr. J. Holland, Jr.	12	10	0	Pd.	20
The Earl of Dartmouth	15	12	6	Pd.	25
Mr. J. Underhill	3	2	6	Pd.	5
Mr. W. Underhill					5
Mr. G. L. Underhill	6	5	0	Pd.	10
The Earl of Powis	12	10	0	Pd.	20
Mr. W. L. Underhill	3	2	6	Pd.	5
Mr. E. Coeser	62	10	0	Pd.	100
Mr. Holyoake	62	10	0	Pd.	100
Mr. S. Leveridge	62	10	0	Pd.	100
Sir F. L. H. Goodricke	62	10	0	Pd.	100
Mr. H. Heane					100
Mr. C. Clarke	62	10	0	Pd.	100
Mr. F. Simpson					10
Mr. T. T. Kesteven					50
Mr. W. P. Roebuck					50
Mr. R. S. Key					20
Mr. J. Thorneycroft					100
Mr. J. Sidney					10
Mr. W. Clark					5
Mrs. H. Newbury	31	5	0	Pd.	50
Mr. H. Robertson					200
Mr. T. W. Giffard					20
Miss C. J. Giffard					5
Mr. J. Wyley					10
Mr. J. Durham					50
Miss Augusta Eliza Marshall					5
Mr. F. C. Perry					100
Mr. H. Underhill					100
Mr. J. E. Underhill					50
Mr. Hawksford					100
Mr. S. Edwards					10
Mr. R. Heane					100
					2059

*At this time the shares of the Company had not been numbered, nor had any specific shares been appropriated to the defendant. [*459]

On the 15th of July, 1857, there was held a general half-yearly meeting of the shareholders of the Company, at which a book was produced by the secretary as and for a register of the shareholders therein; and the following is a copy of the only entry in such book which relates to the defendant:—

Number of shares.	Amount of calls per share paid up.	Name of proprietor.	Addition.	Residence.
2461 to 2560	—	John Hawksford.	—	Wolverhampton.

The seal of the Company was at this meeting affixed to this book as the register of shareholders of the Company.

On the 27th of January, 1858, there was held a general meeting of the shareholders of the Company, at which a book was sealed as the register of shareholders, which, as far as respects the defendant, was in the following form:—

Number of shares.	Amount of calls per share paid up.	Name of proprietor	Share numbers.	Residence.
100	Nil.	Hawksford, John.	2461 to 2560	Whpton.

The following calls of 12s. 6d. per share each were made by the directors of the Company upon the defendant,—six calls of 12s. 6d. per share on one hundred shares in the said Company, due respectively *460] the *2d of September, 1856, 1st of February, 1857, 1st of May, 1857, 1st of September, 1857, 5th of January, 1858, and 11th of May, 1858.

The plaintiffs abandoned the first call at the trial: and it was proved that due notice of all the calls was given to the defendant, and that the time fixed for payment of the several calls had elapsed before the suit.

On the part of the defendant it was submitted that he was upon this evidence entitled to a verdict, on the ground that there was no sealed register within the time required by the Company's Act: that the paper sealed as a register on the 1st of January, 1857, was not sealed within the time mentioned in the 14th section of the Company's Act, or the 9th section of the Companies Clauses Consolidation Act, 1845: that the paper sealed as a register on the 15th of July, 1857, was invalid, as not being sealed at any meeting at which it properly could be sealed: and that there was no consent by the defendant to take shares in the Company after either of those papers was sealed.

The defendant's counsel further submitted, that, at all events, the defendant was only liable to the call made on the 14th of April, 1858, as the alleged registers of the 1st of January, 1857, and the 15th of July, 1857, were not either of them sealed registers within the Companies Clauses Consolidation Act, 1845, and the Company's Act, the provisions of these Acts not having been complied with either in respect of the time of sealing or the contents of the papers so sealed; or, if the last-mentioned register of the 15th of July, 1857, were not invalid, then that the defendant was only liable to the calls made subsequently to the 15th of July, 1857, as the first register, of the 1st of January, 1857, was invalid on the grounds above stated.

*461] The Lord Chief Justice reserved these points for the *opinion of the Court, and the jury found a verdict for the plaintiffs for 340l. 11s. 6d., being the amount of all the calls, with interest, except the first.

In the following Michaelmas Term a rule nisi was obtained on behalf of the defendant, calling upon the plaintiffs to show cause why that verdict should not be set aside and a verdict entered for the defendant, on the ground that the paper first sealed as a register was

not sealed within the time limited by the 8 & 9 Vict. c. 16 and the 18 and 19 Vict. c. cli. (the Company's Act), and on the ground that the paper secondly sealed as a register was not sealed at a meeting at which it could be properly sealed under those Acts, and that there was no consent by the defendant to take shares after either of those papers was sealed; or why the damages should not be reduced to the amount of the calls, with interest, made after the date of the 27th of January, 1858, or to the amount of the calls, with interest, made after the date of the 15th of July, 1857, on the ground that the paper sealed on the 1st of January, 1857, and the paper sealed on the 15th of July, 1857, were not either of them sealed registers within the 8 & 9 Vict. c. 16, and the 18 & 19 Vict. c. cli. (the Company's Act), the provisions of these Acts not having been complied with either in respect of the time of sealing or the contents of the papers so sealed.

The rule was argued in the course of the same term, when the Court, after time taken to consider, ordered that the damages be reduced by the amount of the calls made prior to the 15th of July, 1857.

Against this decision the defendant appealed; and the case now came on for argument in the Exchequer Chamber, before Wightman, J., Crompton, J., Bramwell, B., Channell, B., Blackburn, J., and Wilde, B.

Shee, Serjt. (with whom was *Milward*), for the *defendant. [*462 The statements in the case which affect the defendant are substantially these,—that 100 shares were appropriated for him, that he executed the subscription contract for 600*l.*, that he voted as a proprietor at a meeting of the Company, and that he was the person mentioned in ss. 7 and 19 of the special Act. The dates are important. The special Act received the Royal assent on the 16th of July, 1855. There was no meeting of the Company until the 1st of January, 1857, more than a year and a half after the Act passed into a law. At that meeting the sheet of paper set out in the case was sealed. The second document called a register was sealed at a general meeting on the 15th of July, 1857, and the third at a meeting on the 27th of January, 1858. By the 21st section of the 8 & 9 Vict. c. 16, it is enacted that “the several persons who have subscribed any money towards the undertaking, or their legal representatives, respectively, shall pay the sums respectively so subscribed, or such portions thereof as shall from time to time be called for by the Company, at such times and places as shall be appointed by the Company.” The 22d section empowers the Company from time to time to make calls upon the respective shareholders “in respect of the amount of capital respectively subscribed or owing by them.” The 26th section gives the form of declaration in an action for calls; the 27th provides, that, “on the trial or hearing of such action or suit, it shall be sufficient to prove that the defendant at the time of making such call was a holder of one share or more in the undertaking, and that such call was in fact made and such notice thereof given as is directed by this or the special act:” and the 28th section enacts that “the production of the register of shareholders shall be *primâ facie* evidence of such defendant being a shareholder, and of the number and amount of his shares.”

*463] *The interpretation clause, s. 2, defines the word "shareholder" to mean "shareholder, proprietor, or member of the Company:" and s. 8 enacts that "every person who shall have subscribed the *prescribed* sum or upwards to the capital of the Company, or shall otherwise have become entitled to a share in the Company, and whose name shall have been entered on the register of shareholders therein-after mentioned, shall be deemed a shareholder of the Company." The interpretation clause gives the meaning of the word "prescribed," thus:—"the word 'prescribed' used in this Act in reference to any matter herein stated, shall be construed to refer to such matter as the same shall be prescribed or provided for in the special Act; and the sentence in which such word shall occur shall be construed as if, instead of the word 'prescribed,' the expression 'prescribed for that purpose in the special Act' had been used." By the 9th section of the special Act (18 & 19 Vict. c. cli.), it is provided that "the number of shares into which the capital shall be divided shall be 20,000, and the amount of each share shall be 5*l*." To be a shareholder, a man must have subscribed at least 5*l*. to the capital of the Company. [WIGHTMAN, J.—The conclusion is arrived at in a very embarrassing manner.] The rights and liabilities of a shareholder must be co-extensive. No one can possess those rights or incur those liabilities who has not subscribed for at least 5*l*. to the capital of the Company. Then, the 6th section of the general Act provides that "the capital of the Company shall be divided into shares of the prescribed number and amount; and such shares shall be numbered in arithmetical progression, beginning with number one; and every such share shall be distinguished by its appropriate number." The words "or shall otherwise have
 *464] become entitled to a share in the Company," refer to *the modes of acquiring shares pointed out by the 14th to the 19th section, viz., by purchase, by devise, marriage, or bankruptcy. To constitute a man a shareholder, therefore, he must have subscribed for at least 5*l*. to the Company's capital, or have become entitled to a share therein by purchase and transfer, or by devise, marriage, or bankruptcy, and his name must be entered on the register of shareholders. It may be said that Mr. Hawksford became a subscriber when he executed the parliamentary contract for 600*l*. That, however, was not a subscribing for shares within the meaning of the Act. The parliamentary contract was dated the 30th of December, 1854: at that time the special Act had not passed; no Company existed: what the defendant undertook by executing that contract, was, to pay the sum subscribed by him towards the expenses of procuring the Act and forming the Company. [BLACKBURN, J.—If the defendant had paid the 600*l*., would it not have been subscribed to the capital of the Company?] It is submitted that that would not satisfy the words of s. 8, "shall have subscribed the prescribed sum to the capital of the Company." [CROMPTON, J.—Does "subscribe" mean anything more than being owner of a portion of the capital of the Company?] No one can be said to subscribe for a share at a time when no shares have been created. Then it will be said that the defendant is a person who is mentioned in the 7th and 19th sections of the special Act. The 7th section incorporates certain persons (among whom is the defendant) and all other persons and corporations who have already subscribed

or who shall hereafter subscribe to the undertaking by the Act authorized, and their executors, &c. The defendant clearly would by virtue of that section become a member of the Company: and by s. 19 he is named as one of the first directors. The election of future *directors is provided for by the 83d and following sections of the [*465 general Act. The qualification of a director by s. 17 of the special Act is, the possession by the party in his own right of 100 shares at least in the undertaking: and the 85th section of the general Act provides that "no person shall be capable of being a director unless he be a shareholder, nor unless he be possessed of the prescribed number, if any, of shares." Though a member of the Company, therefore, and a director, the defendant was not a qualified director: he had no shares appropriated to him or to any one else until the 15th of July, 1857. Then, is the case at all advanced by his having voted as a proprietor at a meeting of the Company? He could only legally vote in respect of shares. If no shares had then been appropriated or existed, he did a very irregular thing: but his usurpation could neither give him any rights nor impose upon him any liability. Then we are told, that, on the 15th of July, 1857, certain specified shares were appropriated to the defendant. That alone would not make him a shareholder, unless it can be held to be equivalent to a subscription by him. [BLACKBURN, J.—Shareholders may vote by proxy: s. 83. How can they do so unless they are shareholders? Does not that show that the legislature contemplated that there might be "shareholders" before the subsequent steps had been taken?] The word "shareholder" is evidently used very loosely. The first thing necessary to the creation of shares is the sealing of a register. The provisions as to the register are to be found in s. 9 of the general Act, which enacts that "the Company shall keep a book, to be called the 'Register of Shareholders;' and in such book shall be fairly and distinctly entered from time to time the names of the several corporations and the names and additions of the several persons entitled to shares in the *Company, together with the number of shares to which [*466 such shareholders shall be respectively entitled, distinguishing each share by its number, and the amount of the subscriptions paid on such shares; and the surnames or corporate names of the said shareholders shall be placed in alphabetical order; and such book shall be authenticated by the common seal of the Company being affixed thereto; and such authentication shall take place at the first ordinary meeting, or at the next subsequent meeting of the Company, and so from time to time at each ordinary meeting of the Company:" and by s. 28, the production of the register of shareholders shall be *prima facie* evidence of such defendant being a shareholder, and of the number and amount of his shares." That which is relied upon as the register here has none of the requisites pointed out by s. 9. It does not state the number of each share allotted to the defendant; nor does it give the defendant's addition. Forms of this sort should be strictly adhered to. "The books of the Company," says Lord Brougham, in *Bain v. The Whitehaven and Furness Junction Railway Company*, 3 House of Lords Cases 1, 22, "are made evidence for the Company, and unless rebutted by counter-evidence, will be sufficient to warrant a verdict in each case. It must be admitted that this is a very great

privilege, and an exception to the ordinary rules of evidence. By those rules, and the rules of common sense and justice, what a man writes is evidence against him, but not evidence in his favour: but here the proposition is reversed. So that the Company, by writing in their books that 'A. B. holds' a certain number of shares, can go into Court and make A. B. answerable for them, and can produce the entry as evidence against him. This is a great privilege; and, in order to justify the exercise of it, the conditions on which it is given, namely, the

*467] *provisions of the statute as to the making of these entries, must be strictly complied with: and I hold that it is much safer to consider each of those provisions as a condition precedent, as a provision imperative, and not merely directory, on account of the great importance of the privilege itself, and on account of its being an exception to all ordinary rules of evidence. If, therefore, I had not found a distinct compliance with the requisitions of the 9th section, I should not have considered that the 29th section(a) was of any avail to the appellant in making these books evidence for him, and against his adversary." The judgment of the Court below in this case goes far beyond what was laid down by this Court in *The London Grand Junction Railway Company v. Freeman*, 2 Scott N. R. 705, 2 M. & G. 606 (E. C. L. R. vol. 40). Erle, C. J., in giving judgment, says: "The question is raised, whether there can be a holder of a share within the 27th section, without a register of shareholders authenticated by the seal of the Company affixed at an ordinary meeting. This question we answer in the affirmative. We consider that all requisites to make a shareholder are complied with except the sealing; so that the question is, whether it is impossible to hold a share unless the name of the holder is in a register of shareholders lawfully sealed. We find no such enactment: and, in respect of transferrees, we think they may be holders without this requisite; and although, as above said, the shares must be numbered and specifically appropriated, and this process requires the formation of a book analogous to a register, still it may be done without authentication by sealing at an ordinary meeting. The argument for the defendant rests on s. 8, which describes a *468] *shareholder to be, 'every person who shall have subscribed, &c., or who shall have otherwise become entitled, &c., and whose name shall have been entered on the register of shareholders.' This is description rather than definition, as it is clear that a transferee is entitled to a share, and may be a shareholder, without his name being on the register of shareholders, if it is on the register of transfers. We think the statute contemplated the process above described of numbering and appropriating, and may well have intended that an inchoate register-book *bonâ fide* intended to be valid might be taken for this purpose as a register *de facto*, although not properly sealed; and also that the Act probably intended names to be added from time to time in intervals between the meetings for sealing. There is no decision on the point in respect of an original shareholder; the dictum relating thereto in the *Newry and Enniskillen Railway Company v. Edmunds*, 2 Exch. 118,† is extrajudicial. The principle laid down in *The Southampton Dock Company v. Richards*, 1 Scott N. R. 219, 1

(a) Of the 8 & 9 Vict. c. 17, the *Scottish Companies Clauses Consolidation Act*, the 8th and 29th sections of which correspond to the 8th and 28th of the 8 & 9 Vict. c. 16.

M. & G. 448 (E. C. L. R. vol. 39), and adopted in *The London Grand Junction Railway Company v. Freeman*, 2 Scott N. R. 705, 2 M. & G. 606 (E. C. L. R. vol. 40), that a book *bonâ fide* intended to be a register, though materially defective, should operate as a register, in an action for calls, on account of the inconvenience which would arise if a debtor could defeat the claim upon him by resorting to formal defects in the register of shareholders, supports our decision." That goes to repeal the statute altogether. The dictum of Parke, B., there referred to, seems to have been very well considered. After referring to the several sections, the learned Baron says: "The result is, that there is no register until after it is sealed; and no person who was not an original subscriber can be liable as a shareholder, unless his name is on a sealed register. *Probably that is required both in the case [*469 of an original subscriber and a transferee of scrip. It is only necessary in this case to say that a transferee is not liable for calls until after his name is entered on a sealed register." It is not unworthy of remark that this general provision, prescribing a particular limit of time within which the seal can be validly affixed, was passed at a time when there had been several private Acts passed containing precisely the same enactment: see the South Eastern Railway Act, 6 & 7 W. 4, c. lxxv., s. 109, which is the common form of such provisions. The object was, to remedy a great inconvenience. If the register be sealed in due time, the shareholders have the means of knowing whether the persons acting as directors, and assuming to make calls, are really qualified to act as such. The time of sealing is essential. Here, the requisites of the Act were not observed either as respects the form of the register, the time of sealing, the numbers of the shares, or the additions of the shareholders. [WIGHTMAN, J.—The result of your argument would be, that, if the first general meeting was not held within the prescribed time, the whole scheme becomes abortive and falls to the ground.] All schemes which are worth keeping on foot will observe the regulations. Those which are got up for purposes of fraud may very properly sink. [CROMPTON, J.—To sustain your argument, you want negative words, which are not in the clause.] The statute provides that the list or register shall be authenticated in a particular manner. [WIGHTMAN, J.—The 9th section of the general Act enacts that the authentication of the register by affixing thereto the seal of the Company shall take place at the first ordinary meeting or at the next subsequent meeting of the Company; and the 15th section of the special Act provides that "the quorum of any general meeting of the *Company shall be such number of shareholders as shall hold in the aggregate not less than 3000*l.* in the [*470 capital of the Company." How are you to constitute a quorum? The register cannot be sealed until there is a quorum: and yet it is contended that there can be no shareholders until there is a quorum!] The statute creates the parties forming the Company shareholders to that limited extent. [CROMPTON, J.—Is the sealing anything more than an authentication for the purpose of proof; not that it is an ingredient in the making of the book?] To hold that there can be shares before the list is duly made out and sealed at a general meeting, will altogether defeat the objects of this very salutary provision.

Mellish, Q. C. (with whom was *Montague Smith, Q. C.*), was stopped by the Court.

WIGHTMAN, J.—We are all of opinion that the judgment of the Court of Common Pleas should be affirmed, upon the ground stated by *Erle, C. J.*, in the judgment, in which he says,—“The question raised is, whether there can be a holder of a share within the 27th section, without a register of shareholders authenticated by the seal of the Company affixed at an ordinary meeting. This question we answer in the affirmative. We consider that all requisites to make a shareholder are complied with except the sealing: so that the question is, whether it is impossible to hold a share unless the name of the holder is in a register of shareholders lawfully sealed. We find no such enactment; and, in respect of transferees, we think they may be holders without this requisite; and although, as above said, the shares must be numbered and specifically appropriated, and this process requires the formation of a book analogous to a register, still it *471] may be done *without authentication by sealing at an ordinary meeting.” We are of the same opinion. The sealing may be necessary to make the register evidence, but not for the purpose of making a party a shareholder. Upon that short ground, we think the judgment of the Court below should be affirmed.

Judgment affirmed.

RALSTON v. SMITH. Nov. 28.

An invention of “improvements in embossing and finishing woven fabrics and in the machinery or apparatus employed therein,” as described in the specification, consisted in the use of rollers having “any design grooved, fluted, engraved, milled, or otherwise indented upon them.” A disclaimer was afterwards entered, from the statements wherein it appeared that the effect desired could *only* be produced by the use of a certain species of roller not particularly described in the specification viz. a roller having *circular grooves* round its surface. All other rollers were expressly disclaimed:—

Held, by the Exchequer Chamber,—affirming the judgment of the Court below,—that such a disclaimer was in effect an attempt to turn a specification for an impracticable generality into a grant for a specific process which was comprised within the generality in one sense, but could not be discovered to be there without going through the same course of experiment which led to the discovery of the specific process in the disclaimer: and, consequently, that the disclaimer was void, as an attempt to extend the patent.

THIS was an action for the infringement of a patent for “Improvements in embossing and finishing woven fabrics, and in the machinery or apparatus employed therein.”

The cause was tried before *Erle, C. J.*, at the sittings at Westminster after Trinity Term, 1860, when a verdict was found for the plaintiff, subject to a motion to enter a verdict for the defendant upon certain points reserved. A rule was accordingly obtained, and after argument and time taken to consider, made absolute: vide 9 C. B. N. S. 117 (E. C. L. R. vol. 99).

The substance of the case was as follows:—The use of a roller and a bowl for calendering woven fabrics, and the means of regulating the relative speed of their motion, were well known. In the process of calendering, the roller was smooth, and the speed of the roller and

bowl was unequal: in embossing, the roller was *patterned, and the speed of the roller and bowl was equal. The plaintiff's [*472 patent was originally taken out for a combination of the patterned roller with unequal speeds of the roller and the bowl. Having afterwards discovered that one description of roller only would answer, the plaintiff entered a disclaimer, and by his amended specification confined his claim to one kind of substance for the roller, viz. a hard metal, and one kind of pattern for engraving thereon, viz. circular grooves round the roller.

The Court of Common Pleas held that the alleged invention as originally specified was void for want of novelty and utility; and that the amended specification was practically a claim for a new invention, and not a part of any invention comprised in the original specification.

Against this decision the plaintiff appealed. The appeal was heard in the Exchequer Chamber on the 17th of June and the 28th of November, 1861, the judges present on the first occasion being Pollock, C. B., Wightman, J., Crompton, J., Bramwell, B., Blackburn, J., and Wilde, B., and, on the second, Wightman, J., Crompton, J., Channell, B., Blackburn, J., and Wilde, B.

Bovill, Q. C. (with whom was *Hindmarch*), was heard for the appellant, and *Grove* Q. C. (with whom were *Mellish*, Q. C., and *Aston*), for the respondent. The arguments and authorities cited were substantially those respectively relied on in the Court below.

The points urged on behalf of the plaintiff were as follows:—

"1. That the invention as originally described in the specification of the plaintiff's patent was a good subject of a patent, and that the patent was not after *disclaimer void for want of novelty or [*473 utility in the invention or sufficiency in the specification:

"2. That the disclaimer and memorandum of alteration filed by the plaintiff did not extend the exclusive right granted by the patent, and were therefore authorized by the 5 & 6 W. 4, c. 83, s. 1, and the other statutes relating to disclaimers, and must, according to the provision of the statute above mentioned, be deemed and taken to be part of the letters patent and specification:

"3. That the specification, as amended by the disclaimer and memorandum of alteration, sufficiently describes and claims a part of the invention originally described in the specification, and that the specification as so amended does not claim anything not previously claimed by the specification:

"4. That there was sufficient evidence of infringement by the defendant, to go to the jury:

"5. That the use of rollers with spiral grooves, as used by the defendant, might be and was a colourable imitation of the plaintiff's invention, and an infringement of the patent; and the defendant's process produced the combined effects of glazing and embossing woven fabrics in one operation by substantially the same means and in substantially the same manner as in finishing cloth by the process claimed by the plaintiff."

The points urged on behalf of the defendant were as follows:—

"1. That the invention of the plaintiff below was a mere application

of old processes to analogous purposes, and was not the proper subject-matter of letters patent:

"2. That the original specification of the plaintiff below did not describe any new invention; and that *the process of manufac-
*474] ture in his specification is useless and impracticable:

"3. That the plaintiff below had not at the date of his first specification invented what he now claims as his invention; and that he described in his specification, as altered by disclaimer, a different invention from that for which the letters patent were granted:

"4. That the disclaimer taken with the original specification does not describe how the alleged invention is to be performed, by stating the materials to be employed for the rollers, and does not state what is the invention claimed:

"5. That the disclaimer and memorandum of alteration extended the exclusive right for which the letters patent of the plaintiff below were granted, and that the said letters patent are therefore void:

"6. That the respondent (the defendant below) has not been guilty of infringement, in that the plaintiff below by his disclaimer and memorandum of alteration limited his claim to rings made round the roller, which the defendant below did not in fact use."

WIGHTMAN, J., now delivered the judgment of the Court:—

The invention as described in the original specification consists in the use of rollers having "any design grooved, fluted, engraved, milled, or otherwise indented upon them:" but it appears from the statements in the disclaimer that the effect desired can *only* be produced by the use of a certain species of roller not particularly described in the specification, namely, a roller having circular grooves, &c., round their surfaces. And all *other* rollers are expressly disclaimed.

But, if the *other* rollers disclaimed will not succeed, and the special rollers are alone effectual, then the true invention resides entirely in
*475] the process described in the *disclaimer: and the original specification does not describe or even suggest the form of roller in which that invention consists. And this is by the disclaimer to extend the right granted by the patent.

The patentee who made and described the invention which is found in the specification, appears not to have conceived the invention mentioned in the disclaimer; for, he had not found out, or, if he had, he did not give to the public the necessary elements of the process which is alone effectual, as in the disclaimer set forth. And we concur in the opinion expressed by the Court of Common Pleas, that "such a disclaimer is in effect an attempt to turn a specification for an impracticable generality into a grant for a specific process which is comprised within the generality in one sense, but could not be discovered to be there without going through the same course of experiment which led to the discovery of the specific process in the disclaimer." On this point, therefore, the judgment must be affirmed.

With respect to the entry of the verdict on the plea of not guilty, we are not prepared to concur with the Court of Common Pleas in directing a verdict to be entered for the defendant; and we are disposed to think that it ought to be entered for the plaintiff: but, as our judgment is in favour of the defendant upon the main point, this

is comparatively unimportant; and we are relieved from the necessity of considering whether there should be a venire de novo upon this issue, by the agreement of the defendant's counsel.

Judgment affirmed, except as to the issue upon not guilty, and upon that the verdict to be entered for the plaintiff.

* MEMORANDA

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The Right Hon. John Baron Campbell, Lord High Chancellor of England, died suddenly on Sunday, the 23d of June, 1861, at his residence, Stratheden House, Knightsbridge.

Sir Richard Bethell, Knight, Her Majesty's Attorney-General, was thereupon appointed Lord High Chancellor, and was created a peer by the title of Baron Westbury, of Westbury, in the county of Wilts.

Sir William Atherton, Her Majesty's Solicitor-General, was promoted to the office of Attorney-General; and Roundell Palmer, Esq., one of Her Majesty's Counsel learned in the Law, was appointed Solicitor-General, and received the honour of Knighthood.

CASES

ARGUED AND DETERMINED

THE COURT OF COMMON PLEAS,

Hilary Term,

XXV. VICTORIA. 1862.

The Judges who usually sat in banco in this term, were—

ERLE, C. J.

WILLES, J.

WILLIAMS, J.

KEATING, J.

REGULA GENERALIS.

As to Special Cases, Special Verdicts, and Bills of Exceptions.

‘It is ordered, that from and after the first day of Easter Term next, inclusive, every special case, special verdict, and bill of exceptions set down in any of the superior Courts of common law, shall be divided into paragraphs, which, as nearly as may be, shall [each] be confined to a distinct portion of the subject: and every paragraph shall be numbered consecutively:

“And that the masters, on taxation, do not allow the costs of drawing and copying any special case, special *verdict, or bill of exceptions not in substance in compliance with this rule, without the special order of the Court.

“A. E. COCKBURN.

“W. ERLE.

“FRED. POLLOCK.”

“Jan. 21, 1862.”

JOHN THOMAS COLLIER, Appellant; FREDERICK KING,
Respondent. Jan. 15.

The respondent will not be allowed costs on a registration appeal, where the case is a reasonably fit one for argument.

THIS was an appeal against the decision of a revising barrister,

which decision the Court, after time taken to consider, affirmed: *vide* *antè*, p. 14.

Coleridge, Q. C., for the respondent, applied for the costs of the appeal. He referred to *Passingham*, app., *Pitty*, resp., 17 C. B. 299, 315 (E. C. L. R. vol. 84), and *De Boinville*, app., *Arnold*, resp., 1 C. B. N. S. 3, 22 (E. C. L. R. vol. 87); in which latter case *Cresswell*, J., after consulting the master, said "he understood the practice to be, to allow the respondent his costs of the appeal, when the decision of the revising barrister is affirmed.(a)

ERLE, C. J.—I find, that, in the return made by *Tindal*, C. J., to the House of Commons upon the subject of these appeals, in 1845, that learned Judge states that the principle upon which the Court had acted with regard to costs was this, viz., "that, where the subject-matter of the appeal presented a fair and reasonable ground of doubt as to the legal construction of the statute, and the propriety of the determination of the revising barrister, it was not the intention of the *legislature that costs should be awarded against the unsuccessful party." Here, it was as near as possible a case in which the Court was equally divided. In *Clark*, app., *The Overseers of Bury St. Edmunds*, resp., 1 C. B. N. S. 23 (E. C. L. R. vol. 87), costs were not given, the case being one of reasonable doubt: but in *Hannaford*, app., *Whiteway*, resp., 1 C. B. N. S. 53, the Court not thinking it necessary to hear the respondent in support of his vote, costs were allowed. Again, in *Steward*, app., *Sherlock*, resp., 7 C. B. N. S. 21 (E. C. L. R. vol. 97), the case being considered a reasonable one for argument, costs were refused. We cannot, consistently with these decisions, grant costs here. *Coleridge* took nothing.

(a) "Especially," adds *Willes*, J., "where, as here, the party's claim to the franchise is established by our decision,"—which was not the case upon this occasion.

READE v. CONQUEST. Jan. 20.

The author of a drama called "Gold," which had been printed and represented on the stage, published a novel founded upon it, called "It is never too late to mend," to which novel he transferred some of the scenes from the drama. The defendant caused another drama to be constructed from the novel, which he called "Never too late to mend," taking many of the scenes from the novel which had been imported into the novel from the original drama, and produced it at his theatre:—

Held, that this was an infringement of the plaintiff's copyright in his drama.

THIS was an action brought to recover damages for an alleged infringement of the plaintiff's alleged sole liberty of representing and causing to be represented at any place or places of dramatic entertainment in Great Britain a duly registered play or dramatic piece or entertainment, intitled "Gold," composed by the plaintiff, and of which he was the duly registered author and proprietor, as alleged by him; and for the alleged infringement of the plaintiff's alleged copyright in a certain duly registered book, being a tale, novel, or story, intitled "It is never too late to mend."

The defendant pleaded not guilty to the whole declaration, and, to the second count, leave and license; and he also demurred to the

second count. The plaintiff joined issue on the pleas, and joined in *480] *demurrer. The demurrer was argued in Hilary Term last, and judgment was given upon such demurrer for the defendant vide 9 C. B. N. S. 755 (E. C. L. R. vol. 99).

The issues in fact came on to be tried before Erle, C. J., at the sittings in Middlesex after Easter Term last, when a verdict was found for the plaintiff for 160*l.* damages, subject to the opinion of the Court upon the following case:—

The plaintiff, at the times of the representations and performances by the defendant hereinafter mentioned, was and is the duly registered author and proprietor of, and had and still has the sole liberty of representing and causing to be represented at any place or places of dramatic entertainment in Great Britain, a certain duly registered play or dramatic piece or entertainment composed by him, intituled "Gold," and the plaintiff was then the author of and the duly registered proprietor of a subsisting copyright in the said play of "Gold," as, and which then was, a duly registered book, and also the author of and the duly registered proprietor of a subsisting copyright in a certain other duly registered book, being a tale, novel, or story, intituled "It is never too late to mend," published by him.

The aforesaid play or dramatic piece or entertainment was composed and duly registered as such by the plaintiff; and the said play was also duly registered as a book, and the plaintiff was the proprietor of the copyright therein, and the same was published by him before the composition or registration of the said book intituled "It is never too late to mend," and before the existence of any copyright therein. The said last-mentioned book was founded upon the said play or dramatic piece or entertainment so then also published as a book. The said play or dramatic piece or entertainment, before the representation or performance by the defendant as hereinafter mentioned, had been *481] represented and performed with the plaintiff's *license, for reward to the plaintiff, at certain places of dramatic entertainment in Great Britain.

After the said play or dramatic piece or entertainment of the plaintiff called "Gold" had been composed and duly registered by the plaintiff, and had been so performed and represented with the license and consent for reward to the plaintiff, and after the registration and publication of the same as a book, and after the registration and publication of the said book intituled "It is never too late to mend," the defendant, who then was and is the licensed proprietor of a certain place of dramatic entertainment in Great Britain called "The Grecian Theatre," represented and performed and caused to be represented and performed at the said Grecian Theatre on eighty different occasions a certain play or dramatic piece or entertainment intituled "Never too late to mend." The author of the said last-mentioned play or dramatic piece or entertainment, who as such was paid by the defendant for each of the said last-mentioned performances and representations, composed it principally by dramatizing the plaintiff's said novel "It is never too late to mend," and partly from his own head, without having seen or heard of the plaintiff's said play or dramatic piece or entertainment or book intituled "Gold," or being acquainted with its contents. But such author became aware of the existence of the

plaintiff's said play and book intituled "Gold" within less than three weeks after the first of the said eighty performances and representations aforesaid.

The defendant was not the author of the said play or dramatic piece or entertainment entitled "Never too late to mend," so represented and performed by him at the said Grecian Theatre: and there was not any evidence to show whether he knew that in any respect it resembled or was (if it was) a piracy of the plaintiff's said play or dramatic piece or *entertainment or book called "Gold." But, [*482 after the defendant had several times represented and performed at his said theatre the said play or dramatic piece or entertainment called "Never too late to mend," the plaintiff gave notice to the defendant that they were representations and performances of divers parts of the plaintiff's said play or dramatic piece or entertainment called "Gold," and an infringement of the plaintiff's sole liberty of representing the same and causing the same to be represented at any place or places of dramatic entertainment in Great Britain; and the plaintiff then required the defendant to cease from all such further representations or performances, excepting with the license of the plaintiff, which the plaintiff offered to give to the defendant, as he had previously given to other persons, for reward to be paid to the plaintiff; but the defendant refused to pay the plaintiff the amount required by him for such license; and, after such notice, and without any license from the plaintiff, the defendant on seven occasions represented and performed and caused to be represented and performed as before at the said Grecian Theatre the said play or dramatic piece or entertainment called "Never too late to mend."

One of the actors, a Mr. Mead, employed by the defendant in such representations and performances as aforesaid, and who had frequently acted in the said performances and representations of the plaintiff's said play intituled "Gold," was called as a witness on behalf of the defendant, and stated that he could not deny but that he might on one or two occasions, when performing in the said drama of "Never too late to mend" at the defendant's said theatre, have spoken a part of the plaintiff's said play or dramatic piece or entertainment called "Gold" not contained in the plaintiff's said book or novel,—being a few words at the end called the "Tag;" but that, if he did so, he did *it accidentally, the words of such tag floating in his mind [*483 might have come out mixed up with the strong similarity existing between the tag in the plaintiff's play of "Gold" and that in the drama called "Never too late to mend." That, in so doing, the said actor acted without the knowledge, authority, or direction of the defendant, and without being conscious that he had said anything not in the part set down for him to say by the defendant; and the said part of the plaintiff's said play called "Gold" so delivered by the said actor was no part of the composition of the said play or dramatic piece or entertainment called "Never too late to mend," nor was it contained in the licensed copy of the said last-mentioned play required by law to be left, and which was left, at the Lord Chamberlain's office, and no part of the part set down by the defendant for the said actor to say.

It was agreed between the parties that the pleadings in the action

on both sides should form part of the special case, as also the printed copy of the said play called "Gold," and the licensed copy of the said play called "Never too late to mend," left at the Lord Chamberlain's office as required by law, and also a published copy of the plaintiff's said book intituled "It is never too late to mend," and the certificates of registration of the said play called "Gold," and of the said novel called "It is never too late to mend," which were all put in and proved at the trial: also, that the Court should be at liberty to draw any inferences or find any facts which in the opinion of the Court a jury ought to have drawn or found.

The question for the opinion of the Court was, whether the aforesaid representations and performances by the defendant at the said Grecian Theatre of the said drama called "Never too late to mend," so composed and written as aforesaid, were representations and performances *484] of divers parts of the said play or *dramatic piece or entertainment composed by the plaintiff intituled "Gold," and infringements of his sole liberty of representing the same and causing the same to be represented at any place or places of dramatic entertainment in Great Britain.

If the Court should be of opinion that the aforesaid representations and performances by the defendant at the said Grecian Theatre were representations and performances of divers parts of the said play or dramatic piece or entertainment composed by the plaintiff intituled "Gold," and infringements of his sole liberty of representing the same and causing the same to be represented at any place or places of dramatic entertainment in Great Britain, then the verdict was to be entered for the plaintiff as aforesaid, or for such amount as the Court should direct; but, if the Court should be of a contrary opinion, then a nonsuit was to be entered.

Mr. *Reade*, in person.—It stands admitted on the case, that, in January, 1853, the plaintiff wrote and registered and produced upon the stage a drama called "Gold," and that, in January, 1856, he also wrote and published and registered a novel, founded on the story in the drama, called "It is never too late to mend." It also appears that Mr. G. A. Conquest, the defendant's brother, dramatized the novel, calling his drama "Never too late to mend," and that this last-mentioned drama was produced by the defendant at the Grecian Theatre, as alleged in the first count of the declaration. [*Lush.*—Without any knowledge of the existence of the plaintiff's drama called "Gold."] Knowledge on the defendant's part that he is invading the plaintiff's right is quite unnecessary to constitute the offence of piracy: *Lee v. Simpson*, 3 C. B. 871 (E. C. L. R. vol. 54). The simple question here is, whether, if a man writes a play, and then casts its incidents into *485] the shape of a *novel, he loses his copyright or his sole right of representation in the play. The author of a dramatic piece has by the Dramatic Copyright Act, 3 & 4 W. 4, c. 15, the sole liberty of representing or causing it to be represented at any place of dramatic entertainment: and that right is confirmed by the 5 & 6 Vict. c. 45, s. 21. The 22d section of the last-mentioned statute enacts that "no assignment of the copyright in any book consisting of or containing a dramatic piece or musical composition shall be holden to convey to the assignee the right of representing or performing such dramatic

piece or musical composition, unless an entry in the said registry-book [required by s. 11] shall be made of such assignment, wherein shall be expressed the intention of the parties that such right should pass by such assignment." By the combined effect of these two statutes, therefore, the author of a drama has two separate rights, which may be conveniently distinguished by the names of copyright and stage-right, either or both of which he may assign; he may assign the one to A., the other to B. Suppose the plaintiff assigned the copyright, retaining the stage-right, he could not complain of an infringement of the copyright: or vice versa. If the defendant's drama of "Never too late to mend," partly copied from the plaintiff's drama of "Gold," had been published, the plaintiff would have had a remedy under the Act. Has he not an equal right to complain of an infringement of his stage-right? This question was discussed before Vice-Chancellor Wood in a case of *Reade v. Lacy*, 30 Law J. Ch. 655. It was there held, that, where the owner of copyright in a play wrote a novel founded upon it, to which he transferred several scenes from the play, and afterwards another person dramatized the novel, taking the same scenes from the novel, this is an infringement of the copyright in the play. "Some parts of this work," says the Vice-Chancellor, [*486] "appear to be a copy of Mr. Reade's drama of 'Gold,' only with a different name. Mr. Reade has a copyright in the work 'Gold,' and, so long as he has it, nobody is entitled to reprint that work. But it is said that Mr. Reade having used the drama 'Gold' in the construction of the novel 'It is never too late to mend,' he has so far forfeited his copyright in the drama that the defendant is entitled to dramatize the novel, notwithstanding in doing so he makes use of a considerable portion of the dialogue that originally occurred in 'Gold.' Now, I am far from conceding, except for the purpose of argument, that there is any right so to use the novel, even supposing the drama not to be in existence. How far a dramatic author may be entitled to use a novel without the permission of the author, for the purpose of writing a play, may be a question worthy of consideration. (a) I assume, solely for the purpose of argument, that there exists a right to go to the novel and work upon that novel; and then it is said, because the plaintiff has composed the novel from the drama, and the novel contains scenes which the author has put into his drama, he has not the least property in them, and they may be reproduced because it was done honestly and in ignorance that it was an exact reproduction of the drama. There can hardly be a stronger case than the present to try the question; for, in many places, the two dramas are identical. [His Honor referred to several passages in the two dramas which were verbatim the same.] The argument is, the plaintiff happens to have introduced a good deal of his drama into another book: he has used his own property in another place; and the defendant says, 'I found your property in another place: I did not know you had used it in any other way. I did not think I was *invading' [*487] your copyright, because I found it in another work, to which I contend I had a right to resort.' There really is nothing to try upon this part of the case." And the injunction was granted. The question

(a) *Reade v. Conquest*, 9 C. B. N. S. 755 (E. C. L. R. vol. 99), had not at this time been decided.

here is, whether by the mere act of publishing his novel of "It is never to late too mend," the author forfeits his stage-right in the drama of "Gold."

Lush, Q. C., for the defendant.—It may be conceded that the plaintiff has all the rights he claims in his drama of "Gold." But it is submitted that the defendant's play of "Never too late to mend," constructed upon the plaintiff's novel, which was perfectly lawful, is as much an original production as the plaintiff's drama is; and that the authorship of that play draws with it the right to represent it on the stage. There is a close analogy between patent-right and copyright. There is, however, this difference between them:—The patent-right is given to the first inventor; and, if two men working independently of each other happen to hit upon the same invention, the first who obtains a patent for it shuts out the other; he has got the exclusive right. But, if two literary men treat on the same subject, each may have a copyright in his own production. The one cannot prevent the other from composing a similar work, provided no part of it is copied from his. [WILLIAMS, J.—The production of the one work in no way flows from the existence of the other.] Lord Mansfield, in *Sayre v. Moore*, 1 East 361, n., says: "The act that secures copyright to authors guards against the piracy of the words and sentiments; but it does not prohibit writing on the same subject. As in the case of histories and dictionaries: in the first, a man may give a relation of the same facts, and in the same order of time; in the latter, an interpretation is given of the identical same words. In all these cases the question of fact to come *before a jury is, whether the alteration *488] be colourable or not. There must be such a similitude as to make it probable and reasonable to suppose that one is a transcript of the other, and nothing more than a transcript. So, in the case of prints, no doubt different men may take engravings from the same picture. The same principle holds with regard to charts: whoever has it in his intention to publish a chart may take advantage of all prior publications. There is no monopoly of the subject here, any more than in the other instances; but, upon any question of this nature, the jury will decide whether it be a servile imitation or not." Copyright is, "the sole and exclusive liberty of printing or otherwise multiplying copies" of the party's own composition: 5 & 6 Vict. c. 45. s. 2. That cannot be invaded except by copying. The words of the 8 Anne, c. 19, were the same. The judgment of Lord Eldon in *Matthewson v. Stockdale*, 12 Ves. 270, goes upon the supposition, that, if two men treat on the same subject, if the work of each be original, there is no infringement by either. So also does the judgment in *Longman v. Winchester*, 16 Ves. 269; and again in *Wilkins v. Aikin*, 17 Ves. 422. [WILLIAMS, J.—Suppose a drama published in England is translated into the French language in France,—would a reproduction of it in English from the French, in ignorance of its having been originally translated from English, be an invasion of the right of the original author?] That is substantially this question. If two authors go to independent original sources, each has a right. [ERLE, C. J.—Is the novel here an "original source?"] By original source is meant, any source open to the public. When Mr. Reade published his novel he gave out his conceptions to the world. No person could lawfully

multiply copies of that work; for, that would be an infringement of Mr. Reade's copyright. But any person was at liberty to turn the incidents of that novel *into the form of a drama. It is like the case of a man making an abridgment of a work: he may acquire a copyright in the abridgment. So, the author of this drama constructed from the novel would acquire copyright therein. [WILLIAMS, J.—Provided it interfered with no dramatic right. ERLE, C. J.—Your contention is, that, even if an action would have lain for a piracy of the drama of "Gold," none will lie if the same words are taken from the novel.] Precisely so. To constitute an infringement of copyright or dramatic right, the identical thing must be copied; advantage must be taken of the labour and skill of the author. Suppose two persons set about to dramatize a novel, if each takes the whole of the incidents, the dramas of both will necessarily be much alike. In that case, would the one who gets his play on the stage first have a right to exclude the other? The defendant here has not infringed the statute, because that which he has represented is something substantially different from the plaintiff's production.

Reade, in reply.—Stage-right is even more firmly protected than copyright. No doubt, as the law now stands, if the plaintiff had dramatized a novel, it was competent to the defendant to dramatize it also. But, the play being the original creation, the plaintiff is not divested of his right to the sole representation by his having turned its incidents into a novel. He referred to *Blackwell v. Harper*, 2 Atk. 95, *Planché v. Braham*, 4 N. C. 17 (E. C. L. R. vol. 33), 5 Scott 242, 8 C. & P. 68 (E. C. L. R. vol. 34), and *Colburn v. Simms*, 2 Hare 543.

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the Court:—

The plaintiff sued for an alleged infringement of his stage copyright in a drama called "Gold." The *defendant had caused to be represented a drama called "Never too late to mend:" and it is clear, that, in so doing, he was guilty of the infringement complained of, unless the facts mentioned below constitute a defence, because many parts of the two dramas were the same, and the 3 & 4 W. 4, c. 15, s. 2, enacts, that, if any person, without the consent of the proprietor, shall represent any dramatic production therein described, or any part thereof, he shall be liable to a penalty of not less than 40s.

The facts on which the defendant relied, were, that the plaintiff had published a novel called "It is never too late to mend," which was the drama called "Gold" presented in the form of a novel, containing in substance the same incidents and characters and language; and that the defendant's brother dramatized this novel, calling his drama "Never too late to mend," and, in so doing, took many of the characters and incidents and much of the language of the novel. The consequence was, that many parts of the drama "Never too late to mend" were the same as the corresponding parts of the drama "Gold." But the brother so composed his drama from the plaintiff's novel without having seen or in any way known of the plaintiff's drama "Gold," and took nothing directly therefrom. The drama so composed by his brother the defendant represented at his theatre; and on these facts he contended that his brother was the author of the drama so repre-

sented by him, within the meaning of the statute 3 & 4 W. 4, c. 15. If he was the author, it follows that the plaintiff was not, and that no right of the plaintiff has been violated.

It was argued for him that copyright differs from patent-right, in this, that the patent is to the first inventor, and there cannot be two first inventors, although there may be two original inventors; whereas, *491] copyright belongs to the author of the composition, *and, if two authors invented the same ideas, and clothed them in the same words, each author might have copyright in the same composition, although composed by two original authors. In that case, it was contended that neither of the authors would have infringed any of the rights of the other. A party who multiplied copies taken from such a composition as published by one of them might be liable for infringement of copyright to the author from whose publication he had taken the copies, if that was ascertained, without incurring any liability towards the other author. Upon this principle, he contended that the defendant's brother was an original author of his drama "Never too late to mend," and had both the book copyright and the stage copyright therein.

The Court has already decided in this case that the representation of the brother's drama was no infringement of the plaintiff's book copyright in his novel: and the defendant now further contended that such representation was no infringement of the plaintiff's stage copyright in his drama called "Gold," because the brother was the author of his drama. But we think that this ground of defence fails. The defendant's brother was not the author of those parts of the drama "Never too late to mend" which he copied directly from the plaintiff's novel, and so indirectly from the plaintiff's drama "Gold."

It is not necessary to decide, whether, if the brother published his drama, he would infringe the plaintiff's book copyright under the 5 & 6 Vict. c. 45 in his novel or drama above mentioned. If that question should arise, it would then be time to decide whether the defendant could find any defence: but it is clear that he could not in that case defend himself on the ground that he was the author of the parts which he copied. Here, the question that arises is in respect *492] of *the plaintiff's stage copyright in his drama "Gold." This copyright under 3 & 4 W. 4, c. 15, is infringed, if the whole or any part of it should be represented without leave; and it is clear that a very considerable part of it has been represented by the defendant: he is therefore liable in this action, unless he has an excuse. The excuse offered is as above stated, that the brother is the author of these parts. But the fact is not so. The brother is not the author of those parts, it being admitted that he copied them from the plaintiff's composition, and did not compose them himself.

The fallacy lies in the allegation that the defendant's brother is the author of his drama "Never too late to mend," which is true in one sense and untrue in another. He is the author of parts of it; and, in respect of publishing or representing them, he infringes no right of others, and might sue any other who infringed his right. But, in respect of the parts copied from the plaintiff, if he was sued for publishing and infringing the book copyright, he might perhaps be excused under some of the rules relating to literary property, and to the

power of abridging or taking extracts therefrom, or the like: but he could not justify on the ground that he was the author; and if, as here, he is sued for representing those parts, and so infringing the stage copyright, he cannot justify as author; and that alone is the ground which is now to be disposed of.

The point that the defendant had a defence in his belief that his brother had a right to dramatize the novel, and that therefore he had a right to represent the drama, could not be relied on. If he had the right, his belief would be immaterial: if he had not the right, and had done the wrong complained of, his belief that he was not doing wrong is equally immaterial. In *Lee v. Simpson*, 3 C. B. 871 (E. C. L. R. vol. 54), 6 D. & L. 666, *the defendant had purchased the piece which he represented, and believed he had the right; but, [493 on proof by the plaintiff that *he* had the right, the judgment was against the defendant, on the ground "that he had infringed the plaintiff's property protected by statute, and was an offender within its terms; and, if the plaintiff was bound to show the defendant's knowledge, the protection awarded by the statute would be illusory."

On these grounds, our judgment is for the plaintiff.

Judgment for the plaintiff.

THE GENERAL STEAM NAVIGATION COMPANY v. SLIPPER. *Jan. 20.*

By the terms of a charter-party, the plaintiff's ship (a steam-vessel) was to proceed to H., to be there ready to load by a given day, *or so near thereto as she might safely get*, and there load from the factors of the merchant such quantity of oxen, sheep, and [or] other lawful produce which the merchant might find it convenient to ship, not exceeding what she could reasonably stow and carry over and above her tackle, &c., and, being so loaded, was to proceed thither to London, and deliver the same on being paid freight a lump sum of 450*l.* Two working days were allowed for loading and discharging, and three days on demurrage. The cargo to be taken to and from alongside at the merchant's risk and expense.

Arrived at H., the vessel went alongside the jetty, and received on board a number of barrels of hams and 300 head of live-stock, for which the captain signed bills of lading. Being thus laden, the vessel was found to draw too much water to get over the bar, and the captain was consequently obliged to take out all the stock. He then proposed to the charterer's agent to stow on board so many of the cattle as would enable him to pass over the bar, and to remain outside and there take in the remainder at the charterer's expense and risk. The agent declined to accede to this, and refused to put any of the cattle again on board, unless the captain would take all. Being unable to come to terms, the captain proceeded on his voyage with only the hams on board:—

Held, that, under these circumstances, the owners were not entitled either to the stipulated freight or to damages for the refusal to ship the cargo; for, that, although the captain was not obliged to go within the bar at all, yet, having chosen to do so, and having received the cargo on board, and signed bills of lading, he was bound to find his way to his destination.

THIS was an action brought by the plaintiffs against the defendant for the recovery of 450*l.*, for freight earned by the plaintiffs on a voyage made by their ship "Tiger" from Hjørtting, in Denmark, to London, according to the terms of a charter-party; or, if the Court should be of opinion that such freight was not *earned, for damage sustained by the plaintiffs from the defendant's refusing to [494 ship a cargo.

By consent of the parties, and by a Judge's order pursuant to the

Common Law Procedure Act, 1852, the following case was stated for the opinion of the Court, without any pleadings:—

The plaintiffs are a company, whose principal office is in London, and who own a large number of steam-vessels, and, amongst them, the steamship "Tiger." The defendant is a merchant, who resides and carries on his business in London.

In the month of April, 1860, the defendant was desirous of chartering a steamship to carry a cargo of cattle and other merchandise from Hjeriting to London; and he applied to the plaintiffs to know whether they would for that purpose charter to him their steamship the Tiger. To this the plaintiffs assented; and thereupon the following charter-party was drawn up and signed by the agents of the plaintiffs and defendant respectively:—

"London, April 4th, 1860.

"It is this day mutually agreed between Martin Pratt, Esq., secretary to owners of the steam good ship or vessel called the Tiger, of London, of the burthen of 33½ register tons or thereabouts, now in London, and George Russell, of London, as agent for Slipper & Son,— That the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed sail and proceed to Hjeriting, to be there and ready to load by the 10th of the current month, or so near thereunto as she may safely get, and there load from the factors of the said [merchant] such quantity of oxen, sheep, and ^{and} _{or} other lawful produce which the said merchant may find it convenient to ship, not exceeding what she can reasonably stow *495] *and carry over and above her tackle, apparel, provisions, and furniture; and, being so loaded, shall therewith proceed to London to discharge at Brown's wharf, or so near thereunto as she may safely get, and deliver the same on being paid freight a lump sum of 450*l.* sterling for the entire use of the holds from bulkhead to bulkhead, and decks for cattle and sheep, in full of all port-charges and pilotages (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, boilers, machinery, steam, and steam-navigation, of whatever nature or kind soever during the said voyage always excepted): Freight to be paid on unloading and right delivery of the cargo, in cash: Two working days are to be allowed the merchant (if the ship is not sooner despatched) for loading and discharging, and three days on demurrage over and above the said laying days, to be paid for day by day, at the rate of 12*l.* per day: The master to sign bills of lading without prejudice to this agreement: The vessel to be consigned to charterer's agents at ports of lading and discharge free of commission, but paying the usual fees for customs entry and clearance: The cargo to be taken to and from alongside at merchant's risk and expense: Penalty for non-performance of this agreement, 450*l.*: Lay days not to commence before the 10th of April current, and freight subject to a chartering commission of 2½ per cent. of jettison or mortality of cattle and sheep.

"GEO. RUSSELL.

"Per pro JNO. IRWIN."

In accordance with the above charter-party, the Tiger left London

on the 7th of April, 1860; and on the afternoon of the 9th of the same month anchored off Hjerting.

Hjerting is a small town situate on the shores of an *inlet of the sea on the south-west coast of Jutland, and its position, [*496 as well as the points about it which were material to this inquiry, were shown upon a map which accompanied and was to form part of the case.

The usual landing-place for ships to load and unload their cargoes is a jetty which runs out into the inlet; and across the passage by which vessels proceed down the inlet from Hjerting to the German Ocean are two banks or bars of sand, one called the inner bar, situate about a mile from the jetty, and the other called the outer bar, situate at the mouth of the inlet.

On the 10th of April, under the guidance of a local pilot the Tiger arrived alongside the aforesaid jetty at Hjerting, and the entire use of her holds from bulkhead to bulkhead, and of her deck, was given up to the defendant.

The loading then commenced; and on the two following days a cargo consisting of 96 barrels of hams and of 300 head of live-stock, viz., oxen, bulls, horses, and pigs, which had been provided by the defendant, were stowed on board the ship under the direction of the defendant's son, who was the only person there representing the defendant, and who also acted as interpreter to the captain of the Tiger.

The cargo was stowed in the usual and proper manner, and there was ample room for it in the ship, which when thus loaded was found to draw 14 feet of water forward, and about 14 feet 8 inches aft.

Upon the 12th of April, the loading being completed, the Tiger cast off from the jetty and proceeded on her voyage down the inlet in charge of the same pilot, having on board the defendant's son, who intended to accompany the cargo to London. The captain before starting signed bills of lading in the usual way both in respect of the said cattle and of the barrels of ham, which bills he handed to the defendant's son.

*When the Tiger had steamed about a mile from the jetty, [*497 and while in her proper channel, she suddenly grounded upon the inner bar, and could not be got off, although it was then high-water at spring-tide, and every effort was made to effect that object. Had she waited till the next spring-tide, which would have occurred in the course of a month, she might possibly when loaded have floated over the said bar; but even this possibility depended upon the concurrence of the spring-tides and a prevalence of winds from the western quarter.

On the two following days, April 13th and 14th, and on April 16th, for the purpose of lightening the vessel, 275 head of the cattle, and a large quantity of fresh water, were at the instance of the captain taken out of the ship in lighters; but she still remained immovable. All possible efforts to move her continued to be made, but without success, till April the 20th, when she floated.

On the following day, April 21st, the Tiger was again brought alongside the jetty, and the few head of cattle that still remained in her were landed.

During the time the steamer remained on the bar, the captain took soundings round the ship, with the view of ascertaining what depth of water there was at high tide, and which they found to be but 10 or 11 feet. The depth of water at the outer bar is generally greater by one or two feet than at the inner bar.

On the 21st of April, the captain, in accordance with the regulations of the Custom-House at Hjerting, filed a protest there, containing (amongst others) the following declaration,—“On account of the afore-said vessel being of greater draught of water to be able to proceed with the cargo mentioned in the above-mentioned document, the undersigned declares hereby to discharge the same here, with exception of the afore-mentioned lot of salt pork which remained on board.”

*498] *The captain then proposed to the defendant's son to reship from the jetty so many of the cattle as would reduce the draught of the vessel and enable him, with the said 96 casks of hams which still remained on board, to pass over the bar in safety; but the defendant's son refused to ship a portion only of the cattle, but offered to supply a full cargo at the jetty, and insisted that the captain was bound to receive it on board, and that, unless he would take a full cargo, he should take none.

The captain refused to ship a full cargo, but proposed to stow as many of the cattle on board as would enable him to pass over the bars, and then to remain outside the outer bar, and if possible take in the remainder of the cargo there; but he stated that the anchorage was unsafe, and that there might be considerable danger in thus shipping the cargo: and he added that the defendant's son must bring the rest of the cattle out to him in lighters, and must take upon himself all the risk of their conveyance and shipment. The defendant's son refused to ship the cargo upon these terms.

There would in fact have been no difficulty and but little risk in shipping the remainder of the cargo outside the outer bar, as proposed by the captain, if the wind had been in the east or blowing from any eastern quarter; but, if the wind had been in any other quarter, there might have been considerable difficulty and danger in making the attempt.

Moreover, there is good anchorage between the inner and the outer bars; and it would have been quite possible and prudent under the circumstances to have loaded the cargo between the two bars, and then to have waited for the concurrence of a moderate westerly wind and a spring-tide, which would have enabled the ship to cross the outer bar in safety. This course, however, was not suggested either on the *499] part *of the shipper or of the captain, and does not appear to have occurred to either of the parties.

On the 21st of April, 1860, the captain, without making any further proposition, left the jetty, and proceeded direct to London, having on board no other cargo than the said 96 casks. Before he sailed, the defendant's son demanded the return of those casks; but the captain refused to give them up.

The captain, on crossing the outer bar at high-water, again sounded, and found the depth of water on the bar to be 13 feet. He then with such cargo as he had so shipped proceeded to London, and duly

delivered the same to the defendant there, according to the terms of the charter-party.

On the 24th of April, the two following letters passed between the defendant and Mr. Martin Pratt, the plaintiff's secretary:—

"1 & 2 Fenchurch Street,
"April 24, 1860.

"Martin Pratt, Esq.,

"Dear Sir.—I find to my astonishment that the Tiger has returned from Hjerting without her cargo. Am I to understand it to be your intention to send any other vessel in her stead? as I shall in the mean time hold the Company responsible for all prejudice sustained by non-fulfilment of the contract.

"JOHN SLIPPER."

"April 24th, 1860.

"Messrs. Slipper & Son.

"Gentlemen,—In reference to your letter of this day's date, I beg to acquaint you that the Tiger has returned to London in consequence of your refusal to ship a cargo on board that vessel according to the stipulations provided by the charter-party, and that the directors will hold you responsible for the amount due *to the Company [*500 according to the terms of the charter-party.

"MARTIN PRATT, Secretary."

The Court was to be at liberty to draw any inference of fact which a jury might draw.

The questions for the opinion of the Court were,—first, whether the plaintiffs were entitled to recover from the defendant the lump sum of 450*l.* in the charter-party mentioned,—secondly, whether, if the Court should be of opinion that the said lump sum had not been earned, the plaintiffs were entitled to recover damages from the defendant for refusing to ship a cargo on board the defendant's ship Tiger according to the terms of the charter-party.

If the Court should decide the first of the above questions in the affirmative, then judgment was to be entered up for the plaintiffs for 450*l.* and costs. If the Court should decide the second of the above questions in the affirmative, it was to be referred to an arbitrator to assess the amount of damages, and judgment was to be entered for the plaintiff in accordance with his decision.

If the Court should be of opinion that both questions should be answered in the negative, then judgment was to be entered up for the defendant, with costs.

Knowles, Q. C. (with whom was *C. Pollock*), for the plaintiffs(a)—

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That the plaintiffs performed their part of the charter-party, by taking on board and carrying such a cargo as was given them for that purpose by the defendant:

"2. That it was the act of the defendant that less than a full cargo was shipped, for which the plaintiffs are not responsible:

3. That, if the plaintiffs did not perform their part of the charter-party, they omitted to do so only by reason of the defendant preventing them:

"4. That the plaintiffs, being bound by the charter to load such cargo only as the Tiger could reasonably stow and carry, were not bound to load a greater cargo than she could with safety carry out of the port of Hjerting:

"5. That the Tiger was by the terms of the charter only bound to go so near to Hjerting as she could safely get, and therefore that she was bound to go no nearer than such point as she

The captain did all he could under the circumstances to perform the *501] contract which his *owners had entered into, and all he was bound by the terms of the charter-party to do. It was the act of the defendant's agent at Hjerting which prevented him from bringing home a full cargo. It will probably be contended on the part of the defendant, that it was the captain's duty to remain at Hjerting until the next spring-tides, with the possible concurrence of a westerly wind, might enable the ship to float over the bar. But the terms of the charter-party are manifestly inconsistent with that argument: they all show that an exceedingly short stay there was contemplated. Indeed, it was no part of the captain's duty to go over the bar at all: he would have fulfilled all the law required of him if he had remained *502] outside, and had *called upon the agent of the charterer to bring the cargo alongside at his own risk and expense; for, the owners only stipulate that the vessel shall proceed to Hjerting, to be there and ready to load by a certain day, "or so near thereunto as she might safely get,"—that is, as a loaded ship. In *Shield v. Wilkins*, 5 Exch. 304,† under the terms of a charter-party, the plaintiff's ship was to proceed to Bolderaa, *or as near thereto as she could safely get*, and to load from the defendant's agent a full cargo of timber. The vessel proceeded within the harbour of Bolderaa, and there received a portion of the cargo, but, owing to want of water, she was then taken without the bar, but as near as she could safely get, when it was requested that the rest of the cargo should be delivered, which was refused: and it was held that the plaintiff had complied with the charter-party, and that the defendant was liable for such refusal. Pollock, C. B., there says: "According to the terms of the charter-party, the vessel need not have crossed the bar at all, as she was only called upon to go as near to Bolderaa as she could safely go, and she went inside solely for the defendant's accommodation, and to save him expense." And Rolfe, B., says: "It is perfectly clear what the meaning of this contract is,—that the vessel cannot be said to get safely to that place from which she cannot safely get away with a full cargo. The word 'safely' means *safely as a loaded vessel*. Suppose the place to have been such that she could not have taken in with safety to herself a single deal, that would not have been a place whereto she could safely get; and, consequently, as she could not safely get away from within the bar with a full cargo, that was not such a place within the terms of this charter-party." It is scarcely possible to distinguish that case from the present. The captain suggested the most convenient course that could have *been adopted. Schillizzi v. *503] Derry, 4 Ellis & B. 873 (E. C. L. R. vol. 82), will probably be relied on for the defendant. But that was a case which depended upon its own peculiar circumstances. [WILLIAMS, J.—It does not

could safely load her cargo at; and that, by going to Hjerting in the first instance, the plaintiff did not waive their rights under this provision:

"6. That the defendant or his agent ought to have accepted the captain's offer to take in the remainder of the cargo outside the bar, and, by refusing to do so, failed to fulfil the charter:

"7. That the plaintiffs were prevented from carrying the cargo originally shipped, by perils of the seas; that thereupon the plaintiffs agreed to allow the defendant to unload a part of the said cargo on condition that the defendant should load such a cargo as the plaintiffs could safely carry; and that the plaintiffs allowed the defendant to unload accordingly, but the defendant refused to load such a cargo as the plaintiffs could safely carry."

appear from the case that either of the parties knew that the *Tiger* could not be loaded with a full cargo at the jetty.] It does not.

Lush, Q. C. (with whom was *Murphy*), contra.(a)—Assuming that the captain would have satisfied the owners' contract if he had stayed outside the bar and there demanded a cargo,—he did not adopt that course; but he chose to go to the jetty. Having brought his vessel to the usual loading-place, the captain gives the charterer's agent notice, and places the ship at his *disposal. The agent there [*504 furnishes a full cargo, and it is received on board, and the captain signs bills of lading. The contract of the merchant is then completely performed; and the captain is bound to find his way home with the cargo, unless prevented by any of the exceptions contained in the charter-party and bills of lading. Having incurred all the risk and expense of loading the ship once at the captain's request, the merchant had no further duty to perform. There is nothing to show that either the charterer or his agent knew anything about the depth of water on the bar, or the draught of the vessel. The chart (without which no mariner would approach the place) shows the depth of water at each of the bars, and the captain knows how much water his vessel requires to float her when loaded. In *Shield v. Wilkins*, 5 Exch. 304,† both parties knew that the ship could not load the whole cargo within the bar. The owners were in the same position there as if the vessel had originally stayed outside: they waived none of their rights. The case of *Schillizzi v. Derry*, 4 Ellis & B. 873 (E. C. L. R. vol. 82), however, is a strong authority for the defendant. The declaration stated, that, by charter-party between the plaintiff and defendant, it was agreed that the defendant's ship, then in London, should sail to Galatz or Ibrail, or so near thereunto as she might safely get, and there load a cargo from the plaintiff's factor, and therewith proceed to a port in the united kingdom, or between Havre and Hamburgh inclusive, the act of God, &c., and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever during the voyage, always excepted; that the ship was not prevented by any of the excepted causes from proceeding with and completing her said outward voyage; yet that the defendant made

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That the plaintiffs did not perform their part of the charter, and cannot therefore sue the defendant for lump or other freight:

"2. That the plaintiffs cannot under the circumstances recover damages from the defendant for not loading:

"3. That the plaintiffs were bound to carry to London the entire cargo which was shipped on board the *Tiger* at the jetty on the 12th of April:

"4. That it was the duty of the captain to have tendered his ship to the defendant between the two bars, which was not done:

"5. That there was no proper tender of the plaintiffs' ship outside the outer bar:

"6. That it was possible for the captain, by waiting for another spring-tide, to have carried the entire cargo from the jetty; and that it was his duty to have waited a longer time at Hjerting, so as to be able to do so:

"7. That the defendant was not bound by the charter to give cargo outside the bar at his own risk:

"8. That the plaintiffs were not prevented from performing their charter by any of the excepted perils:

"9. That the plaintiffs are estopped from contending that the jetty at Hjerting was not the proper place for loading."

*505] default in causing the ship to sail and proceed with all *convenient speed on her said outward voyage, and, before the said outward voyage was completed, wrongfully caused the ship to deviate from the course of her said voyage, and wholly abandon the said voyage. The defendants pleaded,—first, not guilty of the alleged breach of the charter-party,—secondly, that the defendants were prevented by the excepted causes, to wit, by the dangers and accidents of the seas, rivers, and navigation, from proceeding with and completing the said outward voyage; upon which pleas issues were joined. It appeared that the ship reached the mouth of the Danube on the 5th of November. Galatz is ninety-five miles up the Danube, and Ibrail twenty miles higher. At the mouth of the Danube is a bar, upon which, at the time of the arrival of the ship, there was not water sufficient to allow her to pass. On the 11th of December, she sailed from the mouth to Odessa (100 miles distant), and there took in a cargo from other parties. It would not have been safe for her to remain off the mouth after the 11th of December; and Odessa was the nearest safe port. On the 7th of January following, there was water enough on the bar of the mouth of the Danube to enable the ship to go up to Galatz, and sail with a cargo out of the river. It was held that both issues should be found for the plaintiff; for, that,—first, the voyage was not completed, even if the vessel was prevented by any of the excepted causes from completing it,—but, secondly, that no such prevention was shown, but, at the most, circumstances of the excepted kind delaying the completion. Wightman, J., there says: “No doubt, the obstruction was temporary. The impossibility of waiting off the harbour’s mouth does not determine the obligation to complete the voyage.” Here the defendant stands upon his rights. If there were any difficulty in the way of the performance by the *506] plaintiffs of their *contract, they ought to have known it, and might have made a special provision for it.

Knowles, in reply.—The defendant appears to have stipulated for this particular ship. It was his duty to have satisfied himself that her draught of water was such as to suit the requirements of the particular port. His agent ought not to have suffered the vessel to take in a full cargo at the jetty, when he must have known, or was bound to know, that she could not get out with it.

ERLE, C. J.—I regret to say that I am unable to come to the conclusion that the plaintiffs are entitled to judgment. It appears to me, that, according to the terms of this charter-party, the captain might have stayed outside the bar, and thus put the defendant to the inconvenience and expense of shipping his cattle and goods there. The reasonable and proper course to have pursued undoubtedly would have been that which was adopted in the case of *Shield v. Wilkins*, 5 Exch. 304.† It is what would have been stipulated for, if both parties had been acquainted with the harbour. Mr. *Lush*, however, repudiates that, and on the part of the defendant insists upon his strict rights. He says, that, after the captain had signed bills of lading and had begun the home voyage, it was his duty to find his way with the goods to their destined port. I am unable to find any answer to that, and therefore feel bound to pronounce judgment for the defendant.

WILLIAMS, J.—I am of the same opinion. I cannot concur with

Mr. *Knowles* that it was the duty of the defendant to know that the *Tiger*, which he himself had selected, was incapable of passing the bar at Hjerting *when loaded. The selection of the ship is nothing. I think that, after the defendant had at the request [*507 of the captain loaded a full cargo at the jetty, and the captain had signed bills of lading acknowledging the receipt of the cargo according to the charter-party, nothing was left for him to do but to find his way home in accordance with the stipulations contained in that document. But it seems to me that the captain, having chosen to go to the jetty, disabled himself from afterwards saying that his proper place of loading was outside the bar. That was long after the time of loading stipulated for by the charter-party had elapsed.

WILLES, J.—I am of the same opinion. Both parties when they entered into this charter-party made a mistake. Acting upon that mistake, the captain, on his arrival at Hjerting, went to the jetty and there received on board a full cargo. He then found that the ship could not proceed. Still, the cargo had been loaded by the charterer at the request and with the consent of the captain, the agent of the owners. Another mistake was also committed by the charterer. He, doubtless, never anticipated that he would have to take the cargo outside the bar at his own expense and risk. This, especially with such a cargo, would necessarily be attended with danger. If the action had been brought by the charterer against the owners for refusing to take the cargo, and he had succeeded in making out his right to damages at all, it would have been by reason of the exception in the charter-party: he could only have been entitled to the value of the voyage, giving the owners credit for the lump sum agreed on as freight, and the expense and risk of the proceeding. The result, therefore, must have been that each party would have borne the loss which had [*508 *fallen properly upon him. The owners clearly cannot recover freight which has never been earned.

KEATING, J.—I am of the same opinion. I regret that the parties did not act in a spirit of mutual accommodation and forbearance. In point of strict right the plaintiffs cannot be entitled to freight which they have not earned.

Judgment for the defendant.

The doctrine of *Shield v. Wilkins*, where it might be taken on board to make up a full cargo, and on the way the raft was broken and lost by the violence of the waves, it was *held* that neither he nor his masters were responsible. *ut supra*, was enforced in *Shaw v. Hart*, 1 Sprague 567, and the master having attempted, for the benefit of the charterer and by the authority of his agent, to tow a raft down the river to a place

PRICE v. MOUAT.

The plaintiff, who was known to be acting in the capacity of a "lace-buyer," was engaged by the defendant, a lace-dealer, under the following memorandum :—" M. agrees to engage P. for the term of three years from Monday the 15th of August, 1859, at the yearly salary of 500*l.*, payable monthly. P. to give the whole of his services, and to be advised and guided by M., if necessary."

In an action by P. against M. for a wrongful dismissal pending the term, on the alleged ground of disobedience of lawful orders :—Held, that evidence was admissible to show the capacity in which the plaintiff was engaged, viz. as "lace-buyer;" and that it was properly left to the jury to say whether or not the orders which he was alleged to have disobeyed were such as a person in that position was bound to obey.

THIS was an action by a servant against his employer for a wrongful dismissal. The declaration was in the usual form. The defendant pleaded several pleas, amongst others a plea alleging that the plaintiff misconducted himself in the service by disobeying the lawful orders of his employer, wherefore he dismissed him.

The cause was tried before Erle, C. J., at the sittings in London after last Trinity Term, when the following facts appeared in evidence :—The defendant and one Nickisson carried on the business of lace-dealers in Russia Row, Milk Street, Cheapside. The plaintiff was in the service of Messrs. Morrison, Dillon & Co., in the capacity of "lace-buyer," a duty which requires considerable skill, judgment, and experience, inasmuch as upon the "buyer" devolves the selection of proper stock at proper prices. In July, 1859, Messrs. Mount & *509] Nickisson proposed to the plaintiff to quit Messrs. *Morrison & Co.'s, and to enter into an engagement with them; and ultimately, on the 5th of August in that year, the following agreement was drawn up and signed by the respective parties :—

"London. Russia Row, Milk Street. 5 August, 1859.

"Messrs. Mouat & Nickisson agree to engage Mr. Henry Price for the term of three years from Monday the 15th day of August, 1859, at the yearly salary of 500*l.*, payable monthly: Mr. H. Price to give the whole of his services, and to be advised and guided by Messrs. Mouat & Nickisson, if necessary."

The plaintiff accordingly entered into the service of Messrs. Mouat & Nickisson until the dissolution of the firm, and afterwards remained with Mr. Mouat (who continued the business) in the capacity of lace-buyer. Early in the year 1861, the defendant, who was evidently seeking an opportunity of putting an end to the engagement, seeing the plaintiff in the warehouse unemployed, desired him to fold some lace on cards, which the plaintiff, deeming the work derogatory and unbecoming his position, refused to do, whereupon the defendant at once dismissed him.

On the part of the plaintiff evidence was tendered for the purpose of showing that the capacity in which he was hired was that of a "lace-buyer," and that the order which he had disobeyed was one which, seeing the capacity in which he was hired, he was not bound to obey.

For the defendant it was insisted, that, inasmuch as the contract was one which by the Statute of Frauds was required to be in writing, it was not competent to the plaintiff to add by oral evidence a term not found in the writing.

The Lord Chief Justice overruled the objection, and allowed the evidence to be given; and he left it to the jury to say whether or not the order to card the lace *was one which, assuming him to have been engaged as a "buyer," the plaintiff was bound to [*510 obey.

The jury returned a verdict for the plaintiff, damages \$757, leave being reserved to the defendant to move to enter a nonsuit if the Court should be of opinion that the extrinsic evidence was not properly admissible.

Hawkins moved accordingly.—He submitted, that, the contract being silent in respect of the capacity in which the plaintiff was engaged, oral evidence was not admissible to add a term to it; and that the lawfulness of the orders was not a question for the jury,—citing *Turner v. Mason*, 14 M. & W. 112,† and *Lilley v. Elwin*, 11 Q. B. 742 (E. C. L. R. vol. 63). [BYLES, J.—If the evidence was properly received, as I think it was, the question to be determined, was, what are the duties of a buyer? Surely that must be for the jury.]

ERLE, C. J.—The question which was before the jury was, whether the order which the plaintiff declined to obey was a lawful order within the contract of hiring. If he was hired as a buyer, he was not bound to perform services not properly appertaining to that character. As to the admissibility of the evidence,—it seems to me that it was competent to the plaintiff by extrinsic evidence to show the situation he was in at the time the written contract was entered into: the evidence was clearly admissible to explain that; and it was entirely consistent with the written contract. I think the jury were warranted in finding that the plaintiff was hired in the capacity of buyer, and that the orders he disobeyed were not lawful orders. I therefore think there should be no rule.

WILLIAMS, J.—I also am of opinion that there should be no rule in this case. This being a contract which *was not to be performed [*511 within the year, was required by the Statute of Frauds, as was properly urged by Mr. *Hawkins*, to be in writing; and it was contended, that, the contract being in general terms, the statute is not complied with, if it is to be taken as a contract for services as buyer. I think it is unnecessary to decide whether or not upon the evidence of the surrounding circumstances the Court is justified in holding that the contract means services as *buyer*. I think we are bound to say that it means all his reasonable and proper services. But, supposing the declaration were amended by so alleging it, the question still would be whether or not that which the plaintiff was called upon to do was reasonable and proper, regard being had to the circumstances under which he was hired. Of that clearly the jury are the proper and the only judges.

BYLES, J.—I am of the same opinion. This was a contract which is required by the Statute of Frauds to be in writing. Parol or extrinsic evidence was not admissible to add to it. But parol evidence was admissible to explain it. It was proved that this gentleman was a lace-buyer. That was his business or profession. It is plain, therefore, as it seems to me, that, taking that proved fact with the writing, he was hired in the capacity of a lace-buyer. The only question then was, whether that which he was required by the defendant to do was

a thing which he could properly be required to do under that contract. That was a question of fact: and it was left to the jury; and I cannot see that the jury have miscarried in any way.

KEATING, J., concurred.

Rule refused.

*512] *JOHN YATES, Appellant; MARY CHIPPINDALE, Respondent. Jan. 20.

Upon a complaint by a married woman who was living apart from her husband, charging a third party, under the 7 & 8 Vict. c. 101, with being the father of a bastard child of which she had been delivered, evidence having been given which justified the magistrates in presuming non-access of the husband,—Held, that it was no ground of objection to their decision that the magistrates allowed the wife to be asked a question tending to prove non-access of the husband,—the magistrates certifying that they found non-access independently of her evidence.

THE following case was stated for the opinion of the Court, pursuant to the 20 & 21 Vict. c. 43.

At a petty sessions of Her Majesty's justices of the peace of the borough of Lancaster, holden in and for the said borough on the 28th of October, 1861, a complaint by Mary Chippindale, of Lancaster (described therein as a single woman, and hereinafter called the respondent), against John Yates, of Warton-with-Lindeth, farmer (hereinafter called the appellant), charging him under the 7 & 8 Vict. c. 101, with being the father of a bastard child of which she had been delivered on the 26th day of March last (1861), was heard and determined by four justices, viz., John Hall, Richard Hinde, J. S. Harrison, and William Whelon, in the presence of the said parties and their attorneys; and, after they had heard the said parties and their witnesses on oath, an order was made by the justices upon the appellant for the maintenance of the said child in pursuance of the provisions of the said statute, they wholly disbelieving the evidence of the appellant and his witnesses.

The said John Yates gave notice of appeal, on the following grounds,—first, "because it was admitted and proved on the hearing of the case, that Mary Chippindale, the mother of the male bastard child of which the justices had adjudged him to be the putative father, was and is a married woman, to wit, the lawful wife of one Thomas Chippindale,"—secondly, "because the presumption of law which holds that the child of a married woman must be legitimate and
*513] the child of her husband until the contrary is proved, was not rebutted by sufficient evidence in the case, and that the evidence did not justify the justices in declaring the said child to be illegitimate,"—thirdly, "because the said Mary Chippindale was improperly allowed to prove non-access between her and her said husband, and collateral matters from which the same might be assumed,"—fourthly, "because there was not sufficient evidence given or offered to the justices except the evidence of the said Mary Chippindale, the mother of the said bastard child, to prove that such child was a bastard, and because her evidence on that point was inadmissible."

The case stated by the justices was as follows:—

The respondent admitted she was the wife of one Thomas Chippindale.

The following evidence was given to prove that the child in question was a bastard:—

Ann Nicholson, the mother of the respondent, proved that the respondent and her husband parted about ten years ago; that the husband deserted his wife at that time, and that she (the witness) had never seen or heard of him since; that the respondent lived at Kendal as a domestic servant afterward and before she came to live at Beetham toll-bar; that, in April of last year (1860), the respondent came to live at the Beetham toll-house, and to keep the Beetham toll-bar, which is about two miles from where this witness resided at the time; that the respondent lived at the toll-bar house alone until the beginning of the present year, when she left it; that the witness visited her at least once a week from the time she came to live there, and during the summer following; and that the respondent has had two children besides the one in question since she was deserted by her husband.

Isaac Baines, of Milnthorp, proved, that, during the whole of last year he was pinder for the township of *Beetham, in which the Beetham toll-bar is situate; that, in the performance of his [*514 duties, it was necessary he should be frequently on the road; that he passed the toll-house at all hours of the day and night, as it might happen; that he passed it at least once a day during that time, and sometimes two or three times a day; that he remembered the respondent coming to the toll-bar house last year, and also remembered when she left; and that she lived alone in the house from the time she came to the time she left, and witness never saw any man go into the house, or come out of it, except the appellant.

John Fawcett, of Milnthorp, marine store dealer, passed the Beetham toll-gate once a week during last year, and knows the respondent well. No one lived with her at the toll-house during that year. She collected the toll from witness always herself whilst she was at the toll-house.

Ann Baines, the wife of John Baines, of Storth, one of the appellant's witnesses, swore that the respondent told her some time in last year she (respondent) had a husband, and that he was living at Catterall with another woman. (This witness, who from her own account had been on very friendly terms with the respondent, and who now showed a strong feelnig on behalf of the appellant, did not venture to assert she had ever seen the respondent's husband, or that any man was living with the respondent during last year.)

Catterall is twenty-five miles from Beetham toll-gate, and between thirty and forty miles from Kendal.

The respondent's attorney put to her the following questions at the close of her examination,—

"Did your husband desert you, and when?" The appellant's attorney objected to these questions: but the justices ruled they could be put, and they were put. She answered "Yes: it was nine years ago last *new year; the first week in the new year." The justices [*515 allowed the questions to be put, because, as they conceived, though the husband might have deserted his wife nearly ten years ago (as had been previously proved by the respondent's mother), non constat he did not afterwards return to his wife and become the father of her children born since that time.

To the following questions put to her by her attorney (with the consent of the appellant's attorney), "Where was your husband living in the year 1860?" she replied "I don't know."

From the above-mentioned facts, the justices inferred and found as facts that the husband of the said respondent had not had any intercourse with her so as to become the father of the child in question; and that he had not had access to her at the period of her conception of the said child; and that the said child was in fact a bastard: and from the other evidence in the case they found the appellant to be in fact the father of the said child.

The questions of law for the opinion of the Court were,—

"Is there anything in the above facts, as proved to the justices, from which the Court could infer the non-intercourse of the respondent and her husband at the time the child in question was begotten, or that the husband had not access to his wife at that time, so as to lead to the conclusion to which they came, that the child is a bastard?"

"Were the questions 'Did your husband desert you, and when?' (being the only questions objected to by the appellant's attorney as inadmissible,) improperly allowed to be put?"

Temple, Q. C., for the appellant.—The respondent being a married woman, the presumption is that the *child is the offspring of *516] the husband. In *The Queen v. The Inhabitants of Mansfield*, 1 Q. B. 444 (E. C. L. R. vol. 41), 1 Gale & D. 7, it was held, that, if there was an opportunity of access by the husband, though the wife was notoriously living in adultery, it does not necessarily follow that a child begotten while such opportunity of access existed was not the husband's. Pateson, J., there says: "Here, the circumstances are, that the pauper was deserted by her husband, who then lived with another woman; that some years afterwards she was married again by banns, living her husband, and afterwards had two children, now seventeen and nineteen years old: and from these facts alone we are called upon to infer that there was no access of the husband to the wife, though during any part of the time he may have been living at the next door." [ERLE, C. J.—We have nothing to do with the facts, if there was any evidence to warrant the justices in finding that there was no access. Probably the husband did not come; and probably the other man did.] It is not enough to show the probability or even the fact of intercourse with another: the evidence must be such as reasonably to show that there was no probability of access on the part of the husband. The evidence here clearly was not sufficient: it should be such as would lead any reasonable man strongly and almost incontrovertibly to the conclusion that the husband could not be the father of the child. It was not enough to show that he was living at the distance of twenty-five miles from the place where his wife lived. She knew he was living there. The conclusion the justices arrived at was clearly not warranted by the legitimate evidence given in the case. And it is clear that they thought so, from the reasons they assign for allowing the questions which were put to the respondent at the end of the case. They evidently were not satisfied *with *517] the other evidence, and therefore allowed her to be examined to prove non-access, which the law does not permit. The rule is so clearly laid down in *The King v. The Inhabitants of Sourton*, 5 Ad.

& E. 180 (E. C. L. R. vol. 31), 6 N. & M. 575 (E. C. L. R. vol. 36). It was there held that neither husband nor wife can be examined for the purpose of proving non-access during marriage: nor can either be examined as to any collateral fact, for the purpose of proving non-access,—as, that the husband, at a particular time, lived at a distance from his wife; and cohabited with another woman. Lord Denman there said: “It is desirable to show, in a case of such importance as this, that we adhere to the old rule of law, without any doubt. The rule cited in Starkie on Evidence p. 139, note (x), 2d ed., from Goodright d. Stevens v. Moss, 2 Cowp. 591 (supported also by Rex v. Kea, 11 East 132, cited in the same note), is, that the parties shall not be permitted after marriage to say that they had no connection. Then, it being clear and indisputable law, that, for the purpose of proving non-access, neither husband nor wife can be a witness, the question is, whether the circumstances of the present case bring it within that rule.” And Littledale, J., said: “It may be a question whether the rule as laid down goes to anything more than the case of a party being put into the witness-box and distinctly asked the question. But I think that it goes farther and excludes all questions which have a tendency to prove access or non-access.”

Kemplay appeared for the respondent, but was not called upon.

ERLE, C. J.—I think this case should go back to the justices to be amended. There was abundant evidence whence the justices were at liberty to infer non-access of the husband, and that the appellant was the father *of the child of the respondent. When that presumption is made, then, according to *The King v. Luffe*, 8 East 193, [*518] the wife is admissible to show that the party charged is the father. If the magistrates had not allowed the questions to be put to the wife, there would have been no difficulty. But, if her answer was the only evidence which satisfied them that the fact of access of the husband did not exist, then her evidence was not admissible for that purpose. The case must go back that they may state how this was.

WILLES, J.—Let the justices inform us, if the fact be so, that they arrived at the conclusion they did without that objectionable piece of evidence.

KEATING, J., concurring,

The Court directed the case to be sent back to the justices to be amended, (a) by stating whether they came to the conclusion of non-access independently of the question and answer of the respondent to which objection was made, and independently of the evidence given by the respondent.

The justices returned the case with the following additions:—

“We beg to amend this case by stating that there was nothing in the evidence of the respondent which *led us to the conclusion [*519] of non-access; and that we found the non-access of the husband independently of the question and answer of the respondent to which

(a) Under the 6th section of the 20 & 21 Vict. c. 43, which enacts, that, “the Court to which a case is transmitted under this Act shall hear and determine the question or questions of law arising thereon, and shall thereupon reverse, affirm, or amend the determination in respect of which the case has been stated, or remit the matter to the justice or justices, with the opinion of the Court thereon,” &c.

objection was made, and independently of the evidence given by the respondent.

"JOHN HALL.

"WM. WHELON.

"J. S. HARRISON."

"I did not come to the conclusion of non-access either from the evidence of the respondent or any other evidence; but, holding a different opinion on this point from the majority, I was overruled by them.

"RICHARD HINDE."

Temple, Q. C., admitted that the amendment put him out of Court.

PER CURIAM.—The decision of the Justices must be affirmed, with costs. Judgment for the respondent, with costs.

See *Hemmenway v. Towner*, 1 Allen (Mass.) 209; *Page v. Dennison*, 5 C. (Pa.) 420, s. c. 1 G. 377; *Kleinert v. Ehlers*, 2 Wr. (Pa.) 439.

*520]

*GRAY v. BOMPAS. Jan. 25.

Where a tenancy from year to year has been determined by a regular notice to quit, the mere accidental detention of the key by the tenant (who has quitted the premises and removed his goods) for two days beyond the expiration of the term, does not amount to any evidence of use and occupation, so as to render him liable for another quarter.

THIS was an appeal from a judgment of the Judge of the County Court of Kent, holden at Ramsgate on the 29th day of October, 1861, in a plaint brought to recover the sum of 26*l.* 5*s.* for one quarter's rent or occupation of No. 14 Royal Crescent, Ramsgate, due July the 6th, 1861.

The plaint was heard on the 24th of September, 1861, when the following facts were proved:—

By agreement, dated the 22d of March, 1859, the plaintiff agreed to let to the defendant a house, No. 14 Royal Crescent, Ramsgate, from the 6th of April, 1859, at the yearly rent of 105*l.*

Possession was not given to the defendant until the 18th of April, 1859, although the defendant was prepared to go in on the 6th of April.

When the first quarter's rent became due, the defendant asked for an allowance from the rent, on the ground that possession had not been given pursuant to agreement. The plaintiff refused to make any allowance, but said he should not be over particular when the defendant wanted to leave, to a day or two.

Notice to quit on the 6th of April, 1861, was duly given by the defendant in October, 1860.

In the first week in March, 1861, the plaintiff, by the defendant's permission, showed two gentlemen over the house, and told them it would be vacant by the 6th of April then next.

The defendant moved out all her goods by the 11th of March to her present residence, which is near Royal Crescent, and brought the key of 14 Royal Crescent with her, which key was kept in her servant's room. After this period, the house remained vacant.

*521] *About the 14th of March, the plaintiff's son applied to the defendant's servant, Henry Moir, for the loan of the key, in

order to show another gentleman over the house. The defendant's servant gave the key to the plaintiff's son, who returned it six or seven hours afterwards.

A few days afterwards, the defendant's servant, the said Henry Moir, met the plaintiff in the street, and asked him if he wished him to fetch the key for him again. The plaintiff replied "No: wait till the 6th. I do not care about it before the time is up."

The plaintiff did not call for the key on Saturday the 6th of April, nor did the defendant send it then. But, on Monday morning, the 8th of April, the key was sent by the defendant to the plaintiff, who refused to receive it, on the ground that it ought to have been sent on the Saturday.

On Tuesday, the 9th of April, the key was left at the plaintiff's house in the presence of the plaintiff, who protested against receiving it, and left it the next day at the defendant's house, and has ever since refused to receive it.

The quarter's rent due on the 6th of April was paid on the 10th.

Upon this evidence, it was contended, on the part of the plaintiff, that the non-delivery of the key on the 6th of April, 1861, was a waiver of the notice to quit, and necessarily continued the tenancy, and rendered the defendant liable as tenant for the next quarter's rent, or for use and occupation for that time.

On the part of the defendant, it was contended,—first, that an inadvertent holding over for two days would not render the defendant liable as tenant to a quarter's rent, but, at most, for the period of actual occupation,—secondly, that the omission to send the key, under the circumstances proved, did not amount *to a holding over,— [522 thirdly, that, if there were a holding over, the previous assertion of the plaintiff that he should not be particular, was sufficient to excuse it. No application for a nonsuit was made; but the matter was left for the Judge's judgment.

Upon these facts, the Judge held the plaintiff entitled to judgment for 26l. 5s.

C. Pollock appeared for the appellant (the defendant); but the Court called upon (a)

Prentice, for the respondent, to support the decision of the County Court Judge (b)—[*WILLES, J.*, observing that *he saw no evidence of any contract on the part of the appellant to pay the [523

(a) The points marked for argument on the part of the appellant were as follows:—

"1. That the Judge of the County Court ought to have given judgment for the defendant:

"2. That the omission to send the key, and the other facts found by the Judge, did not constitute a holding over by the defendant:

"3. That, even if the facts could be held to constitute a holding over under ordinary circumstances, the plaintiff could not take advantage of them, by reason of his assertion at the time of payment of the first quarter's rent, that he should not be over particular, when the defendant wanted to leave, to a day or two:

"4. That, even if there was a holding over by the defendant, of which the plaintiff could take advantage, still the defendant was liable only for the period of her actual occupation, and not for a quarter's rent."

(b) The points marked for argument on the part of the respondent were as follows:—

"1. That the facts stated disclose a case purely for the consideration of the County Court Judge or a jury:

"2. That, although the defendant (the appellant) may not have intended to waive the notice to quit given by her, yet, as she did in fact withhold the key until the commencement of another

rent demanded.] It was a question of fact for the County Court Judge, under what circumstances the tenant held over for the two days; and, if he came to a wrong conclusion, it is no ground of appeal under the 13 & 14 Vict. c. 61, s. 14: see *East Anglian Railway Company v. Lythgoe*, 10 C. B. 726 (E. C. L. R. vol. 70); *Cawley v. Furnell*, 12 C. B. 291 (E. C. L. R. vol. 74); *Cuthbertson, app., Parsons, resp.*, 12 C. B. 304. In the last-mentioned case, Maule, J., says: "No doubt, if it could have been made to appear, by any inference of fact that could legitimately be drawn from the evidence submitted to us, that the judgment of the County Court might be as it is without any miscarriage in point of law on the part of the Judge, that judgment must be left undisturbed, notwithstanding this Court might incline to draw inferences from the facts which might not consist with the conclusion which he has come to." The intention with which a tenant holds over is a question for a jury. In *Jones v. Shears*, 4 Ad. & E. 832 (E. C. L. R. vol. 31), 6 N. & M. 428 (E. C. L. R. vol. 36), in assumpsit for rent of coal, the issue being whether or not the defendants, having given notice to quit, had afterwards waived the notice and continued the tenancy, it was proved, that, after the time fixed by the notice had expired, they continued for two months working out certain portions of the coal, which, however, as they contended, it was usual for a tenant to take away on abandoning such a work: and it was held *524] that it was for the jury to decide, on this issue, whether or not the defendants, in remaining for the two months, intended to waive the notice and continue the tenancy. [WILLES, J.—What evidence was there here of the defendant's intention to hold over as tenant?] The fact of her having retained possession of the key after the expiration of the notice to quit, and the fact that the quarter's rent then due remained unpaid until the 10th of July, afforded some evidence. [WILLES, J.—Suppose she had lost the key?] She might then have told the landlord so. The law imposes no duty upon the landlord to fetch away the key. The County Court Judge having decided in the plaintiff's favour upon the facts, and the question being one which it was open to him to decide either way, the Court will not interfere with his decision.

WILLES, J.(a)—With the greatest respect for the opinion of the County Court Judge who decided this case,—with whose learning and carefulness we are all well acquainted,—I think the judgment is erroneous, and must be reversed, and a judgment in the County Court entered for the appellant. The facts are extremely simple. The defendant, the now appellant, occupied a house as tenant from year to year, under the plaintiff, the now respondent. That tenancy was put an end to by a regular notice to quit, which expired on the 6th of April, 1861. Before that day arrived, the tenant had removed all her goods to another

quarter, it was entirely within the jurisdiction of the Judge to assess the damages for which she was responsible:

"3. That the facts stated in the case disclose sufficient evidence to maintain the judgment given:

"4. That the defendant, not having asked for a nonsuit, is not now at liberty to contend that she was or is entitled to such judgment:

"5. That the Judge, in stating this case, has not presented any question of law for the opinion of the Court, and the appeal should therefore be dismissed."

(a) Erie, C. J., and Williams, J., were sitting in the Court of Criminal Appeal.

house which she had taken for her residence. She had a right to retain the key till the 6th of April. The landlord was aware that the tenant held the key, and had on two occasions sent for it in order to show persons over the house. The fact, therefore, was clear, that the tenant *intended to quit at the expiration of the current year, and [*525 that the landlord intended that she should then cease to be his tenant. The notice to quit expiring on the 6th of April, which was Saturday, the tenant did not send the landlord the key on that day, which would have been a wise precaution to have adopted. She, however, sent it on the following Monday, when the landlord refused to receive it, on the ground that it ought to have been sent on the Saturday. The contention on the part of the landlord in the County Court was, that the detention of the key was a waiver of the notice to quit, and necessarily continued the tenancy, and rendered the defendant liable as tenant for the quarter's rent, or for use and occupation for that time. That contention the judgment of the County Court sustains, on the ground, of course, that there was a contract for an occupation for a quarter of a year at the rent of 26*l.* 5*s.* Now, what evidence is there of any such contract? None whatever, except the accidental detention of the key for two days. It is hardly necessary to say more than that there is no evidence of an intention by keeping the key to continue the tenancy. Mr. *Prentice* contends that there was proof of an occupation of the premises by the defendant from the Saturday to the Monday; and that, if the County Court erred in assessing the value of that occupation at 26*l.* 5*s.*, it was a mere mistake of fact, with which we ought not to interfere. That contention, however, is not well founded, because the mere fact of not returning the key on the 6th of April did not constitute an occupation or evidence of an occupation either on a quantum meruit or under a contract for payment of a full quarter. The result is, that the judgment of the County Court must be reversed, and the judgment entered in favour of the appellant. The only remaining question is as to the costs. It has *been held in this Court that justice cannot be done in [*526 appeals from County Courts, unless we adopt the course laid down in appeals to the Privy Council, viz. to award costs to the successful party in all cases. There certainly is no ground for adopting a different course in this case.

KEATING, J.—For the reasons given by my Brother Willes, I agree with him in thinking that there was no evidence of an occupation by the defendant to render her liable to the extent of a quarter's rent or to any extent at all. I also agree with him that the judgment must be reversed with costs. Judgment reversed, with costs.

ELKIN and Another v. BAKER. Jan. 20.

A. and B., merchants in Australia, mutually agreed that each should buy gold dust, each to have half the profit or to bear half the loss on the resale of the gold dust to be bought by the other. In pursuance of this agreement, A. bought 365 oz. and B. 723 oz. It was then agreed that each of them should consign his parcel to C. in London, for sale on the joint account, with instructions to C. to give A. and B. each credit of account for a moiety of the proceeds of each consignment. In pursuance of this last-mentioned agreement, the gold dust so bought was

consigned to C., B.'s 728 oz. being invoiced as consigned on the "joint account," and accompanied by a letter from B. (dated Feb. 2, 1852), instructing C. to place the net proceeds to the respective accounts of A. and B. in equal moieties. A. likewise consigned his 365 oz. to C., but omitted to send C. instructions to place a moiety of the net proceeds to the account of B. On the 15th of June, 1852, C. sent a letter to A. informing him that he would pass to his credit half the proceeds of the said gold dust, and thereby assented to obey the instructions he had received from B. On the 4th of February, 1852, B. wrote to C. as follows,—“I have no doubt A. has written that half the profits [net proceeds] of the 365 oz. of gold dust shipped to you is to go the credit of B., in the same way as half the profit of the 728 oz. is to go to his credit. If, however, he should not have done so, you will not pass the half profit of the 728 oz. to his credit.” This letter of course was not received by C. at the time he wrote his letter of the 15th of June. B. became bankrupt, and C., having sold both parcels of the gold dust, gave B. credit for the whole of the proceeds of the 728 oz. and for a moiety of the proceeds of the 365 oz. :—

Held, that a plea setting out these facts was a good plea of equitable set-off in an action for money lent, brought by C. against A.

THIS was an action for money lent, money paid, money due upon accounts stated, and interest.

The defendant pleaded,—fourthly, by way of equitable defence, as
 *527] to 322l. 15s. 7d. parcel of the money *claimed in the declaration, that, before this suit, the defendant then being a merchant carrying on business in Australia, in parts beyond the seas, and Messrs. Montefiore & Co. then also being merchants carrying on business in Australia aforesaid, it was agreed between them that each of them should buy gold dust as a joint speculation, and should divide the profit and loss that might arise from a resale of the said gold dust, in manner following, that is to say, that Messrs. Montefiore & Co. should receive for their own use half the profit or bear half the loss, as the case might be, that might arise on the resale of the gold dust to be bought by the defendant, and that the defendant should receive for his own use half the profit or bear half the loss, as the case might be, that might arise on the resale of the gold dust to be bought by the said Messrs. Montefiore & Co.: That, in pursuance of and according to the said agreement, the defendant bought 365 ounces of gold dust subject to and for the purposes of the said agreement, and Messrs. Montefiore & Co. also bought 728 ounces of gold dust subject to and for the purposes of the said agreement: That it was thereupon, and for the purposes of carrying out the first-mentioned agreement, agreed between the defendant and the said Messrs. Montefiore & Co., that each of them should consign to the plaintiffs for sale by the plaintiffs the gold dust so by them bought respectively, and should so consign the same as a consignment on the joint account of the defendant and the said Messrs. Montefiore & Co., and that the defendant should instruct the plaintiffs, that, after paying a certain bill out of the proceeds to be realized by the sale of the said 365 ounces of gold dust, the plaintiffs should divide the net proceeds to arise on the said sale of the same between the defendant and the said Messrs. Montefiore & Co.,
 *528] and should give credit for *one moiety thereof to the defendant, and for the other moiety thereof to the said Messrs. Montefiore & Co., in their respective accounts with the plaintiffs; and that the said Messrs. Montefiore & Co. should instruct the plaintiffs, that, after paying a certain bill out of the proceeds to be realized by the sale of the said 728 ounces of gold dust, the plaintiffs should divide the net proceeds to arise on the sale of the same between the said Messrs. Montefiore & Co. and the defendant, and should give credit

for one moiety thereof to the said Messrs. Montefiore & Co., and for the other moiety thereof to the defendant, in their respective accounts with the plaintiffs and the defendant: That, in pursuance of the said agreements, the defendant and the said Messrs. Montefiore & Co. respectively consigned the gold dust so by them bought respectively, as aforesaid to the plaintiffs for sale, and that the said Messrs. Montefiore & Co. so consigned the said 728 ounces of gold dust as a consignment on the joint account of themselves, the said Messrs. Montefiore & Co., and of the defendant, and notified the same to the plaintiffs by sending to the plaintiffs an invoice of the said gold dust headed as follows,—“Invoice of one box of gold dust shipped on board the Benjamin Elkin, Overbury, commander, for London, consigned to Messrs. B. Elkin & Sons on joint account of John Baker and selves, marked and numbered as per margin:” That the said Messrs. Montefiore & Co. also, according to the said agreement, instructed the plaintiffs, by a letter dated the 2d of February, 1852, which accompanied the said invoice, that the said gold dust was consigned on such joint account as aforesaid, and that, after paying out of the proceeds to arise from a sale of the said gold dust the said bill so to be paid thereout as aforesaid, they the plaintiffs should divide the net proceeds to arise on the said sale of the same equally *between them the said Messrs. Montefiore & Co. and the de- [*529 fendant,—meaning, and being by the plaintiffs understood to mean, that the plaintiffs should give credit for one moiety thereof to the defendant and for the other moiety thereof to the said Messrs. Montefiore & Co.: That he, the defendant, in pursuance of the said agreement, consigned the said 365 ounces of gold dust to the plaintiffs for sale, and intended in so doing to consign the same as such consignment on joint account as aforesaid, and to have the net proceeds after the said bill so to be paid thereout as aforesaid divided as aforesaid, and, by letter dated the 4th of February, 1852, instructed the plaintiffs to pay the said bill so to be paid thereout as aforesaid out of the proceeds to arise from the sale of the said gold dust, but, through inadvertence, in the hurry of business, omitted to give the plaintiffs notice that it was consigned on such joint account as aforesaid, or to instruct the plaintiffs as to the division of the net proceeds as agreed; but did by the said letter of the 4th of February, 1852, inform the plaintiffs that he the defendant was to have one moiety of the said net proceeds to arise on the sale of the gold dust so consigned by the said Messrs. Montefiore & Co. to the plaintiffs: That, before and at the time of the making of the said consignment, and at all times afterwards, the plaintiffs and defendant had accounts between one another, that is to say, accounts as concerned the trade of merchandise as between merchant and merchant: That the plaintiffs received both the said consignments, and the said letter of the 2d of February and invoice from the said Messrs. Montefiore & Co., and the said letter of the 4th of February from the defendant, and thereupon wrote and sent to the defendant a letter, dated the 15th of June, 1852, informing the defendant that they the plaintiffs would pass to the defendant's credit half the *proceeds of the said gold dust after paying the said [*530 bills, and thereby assented to obey the said instructions which they had received from Messrs. Montefiore & Co.: That, after the said

Messrs. Montefiore & Co. had made their said consignment and sent their said letter and invoice, and before the plaintiffs had received the same, or had written their said letter of the 15th of June, J. B. Montefiore, one of the said firm of Messrs. Montefiore & Co., wrote and sent to the plaintiffs, and the plaintiffs received from him, another letter to the plaintiffs, dated the 4th of February, 1852, in which, referring to the defendant and the defendant's said consignment of the said 365 ounces, and the said consignment by the said Messrs. Montefiore & Co. of the said 728 ounces, the said J. B. Montefiore wrote to the plaintiffs as follows,—that is to say,—“I have no doubt Mr. Baker has written that half the profits of the 865 oz. of gold dust shipped to you is to go to the credit of Montefiore & Co. in the same way as half the profit of the 728 oz. is to go to his credit. If, however, he should not (in his haste going away to Melbourne) have done so, you will not pass the half profit of the 728 ounces to his credit.” That the said word profits in the said letter so used as aforesaid meant the said net proceeds, inasmuch as the said net proceeds herein mentioned were profits: That the said J. B. Montefiore wrote the last-mentioned letter, and so as aforesaid countermanded the authority to give the defendant credit for one moiety of the net proceeds of the said 728 ounces of gold dust, without the knowledge, consent, or authority of the defendant: That, before and at the time of sending the last-mentioned letter to the plaintiffs, the said Messrs. Montefiore & Co. had become and were insolvent, and had stopped payment as merchants, and were unable to meet their pecuniary engagements, whereof the plaintiffs, at *531] the time when they received the said letter, and at the time when they gave credit to Messrs. Montefiore & Co. as herein-after mentioned, had notice and knowledge: That, after the receipt by the plaintiffs of the last-mentioned letter, they received the proceeds arising from the sale by them of the said gold dust; and that the net proceeds arising from the said sale of the said 728 ounces, after paying the said bill so thereout to be paid as aforesaid, were 645*l.* 11*s.* 3*d.*, and the net proceeds arising from the said sale of the 365 ounces, after paying the bill so to be paid thereout as aforesaid, were 330*l.* 11*s.* 8*d.*: That thereupon the plaintiffs gave credit to the said Messrs. Montefiore & Co. for one moiety of the said sum of 330*l.* 11*s.* 8*d.*, and forthwith gave notice thereof to the defendant and the said Messrs. Montefiore & Co., to which credit the defendant never objected, but always assented; and thereupon the plaintiffs gave credit to the said Messrs. Montefiore & Co. for the whole of the said sum of 645*l.* 11*s.* 3*d.*, and gave notice thereof to the defendant, to which credit, so far as it relates to a moiety thereof, the defendant never objected, but always assented; and the plaintiffs would not, though often requested by the defendant so to do, give the defendant credit for one half thereof, or for any part thereof: That the plaintiffs never were in any way authorized to give credit to Messrs. Montefiore & Co. alone for the whole of the said sum of 645*l.* 11*s.* 3*d.*, or for any portion of that moiety for which, according to the said letter of Messrs. Montefiore & Co. of the 2d of February, 1852, they were to give credit to the defendant: That, from the time when the said Messrs. Montefiore & Co. became to the time when they were made bankrupts, they continued to be insolvent and unable to meet their pecuniary

engagements, and, by reason thereof, became and were made bankrupts in and according to the laws of Australia aforesaid: [*532 That, on taking the account of the said partnership transactions between the said Messrs. Montefiore & Co. and the defendant, the defendant was and is, and always has been, entitled to receive the whole of the said moiety of the said 642*l.* 11*s.* 3*d.*; and that the payment of that sum to the defendant will finally close the said partnership transaction: That the plaintiffs had knowledge and notice, that, as between the defendant and the said Montefiore & Co., the defendant was, as in fact he always was, entitled to the said moiety of the said 645*l.* 11*s.* 3*d.*: That, if the defendant does not receive credit in his said accounts with the plaintiffs, or payment from the plaintiffs, of the said moiety, the same will, by reason of the insolvency and bankruptcy of the said Messrs. Montefiore & Co., be wholly lost to the defendant: That, after the plaintiff had so as aforesaid given credit to the said Messrs. Montefiore & Co. for the said sum of 645*l.* 11*s.* 3*d.*, the said J. B. Montefiore, by letter dated the 9th of November, 1852, and received by the plaintiffs in the year 1853, gave notice to the plaintiffs that the defendant was entitled to a moiety thereof, and that the plaintiffs ought to give the defendant credit for that moiety: That the plaintiffs have never paid the said moiety, or any part thereof, to the said Messrs. Montefiore & Co., but have, without the consent of the defendant, and without any right so to do, set the same off against a debt due from the said Messrs. Montefiore & Co. to them the plaintiffs, and held and still hold the same, without any such right or authority as aforesaid, for and as a payment of the debt so due to the plaintiffs: That the plaintiffs were never authorized to apply the said moiety, or any part thereof, in payment of any debt due from the said Messrs. Montefiore & Co. to the plaintiffs, or even to their credit; but that, if the authority to place the same to the credit of the defendant [*533 was revoked, then the plaintiffs merely received and have always since held the same as the proceeds of the sale of gold dust consigned to them on the joint account of the defendant and the said Messrs. Montefiore & Co., and long before this suit had notice and knowledge of the right of the defendant to the same: That the same moiety is subject to the first-mentioned agreement between the defendant and the said Messrs. Montefiore & Co.; and that, according to that agreement, the defendant is entitled to the same; and that all things have happened and been done so to entitle him: That this action is brought for a balance claimed by the plaintiffs to be due to them on the said accounts between them and the defendant: And that all the matters and things aforesaid were done and happened before this suit to entitle the defendant, and that, at the time of the commencement of this suit, the defendant was and yet is entitled, in equity, to be paid by the plaintiffs, or to have credit in the said accounts given him by the plaintiffs for, the said moiety, which equals the plaintiffs' claim in respect of the matter herein pleaded to; and the defendant is willing to set the same off against the claim of the plaintiffs in respect of the matter herein pleaded to.

To this plea the plaintiffs demurred, the ground of demurrer stated in the margin being "that the plea discloses no ground for unconditional relief in equity, in the event of the plaintiffs obtaining judgment

at law; that it appears, that, before any assent by the plaintiffs to hold the money for the defendant, J. B. Montefiore revoked the authority to credit the defendant with one moiety of the gold dust consigned by Messrs. Montefiore & Co.; that the defendant did not comply with the terms agreed upon, by instructing the plaintiffs to credit Messrs. Montefiore & Co. with one *moiety of the gold dust consigned by *534] him; and that the defendant's remedy is by action against Messrs. Montefiore & Co." Joinder.

Honyman, in support of the demurrer.(a)—The whole foundation upon which this plea rests fails. The defendant claims credit in his account with the plaintiffs for half the net proceeds of the consignment of gold dust made to them by Messrs. Montefiore & Co. But, according to the terms of the agreement entered into between the defendant and Messrs. Montefiore & Co., the defendant was to send written instructions to the plaintiffs to credit Messrs. Montefiore & Co. with a moiety of the proceeds of the consignment made by him. This condition he neglected to comply with. [ERLE, C. J.—Although the defendant omitted to write to the plaintiffs, Messrs. Montefiore & Co. did receive credit for the moiety of the proceeds.] The plaintiffs were entitled to have the instructions in writing. Besides, it was competent to Messrs. Montefiore & Co. to revoke the instructions which *535] they had given: and this was done *by the letter of Mr. J. B. Montefiore of the 4th of February, 1852, in which he says—“I have no doubt Mr. Baker has written that half the profits of the 365 oz. of gold dust shipped to you is to go to the credit of Montefiore & Co., in the same way as half the profit of the 728 oz. is to go to his credit. *If, however, he should not have done so, you will not pass the half profit of the 728 oz. to his credit.*” [WILLIAMS, J.—If the consignment was the joint property of the two, viz. Messrs. Montefiore & Co. and the defendant, would a Court of equity allow Messrs. Montefiore & Co. to revoke their authority?] There was no joint property; but merely a right, in a certain event, to a moiety of the net proceeds. [WILLES, J.—The plea is full of evidence. Is it not money had and received or nothing?] It was so submitted before Byles, J., at Chambers. [ERLE, C. J.—The invoice shows that the plaintiffs received the consignment on the joint account.] Subject to a condition which was not performed. The plea involves the taking of accounts between the parties, which cannot be done in a Court of law. [WILLES, J.—They might be referred under the Common Law Procedure Act 1854.]

Coleridge, Q. C., contra.(b)—Under the circumstances stated in the

(a) The points marked for argument on the part of the plaintiffs were as follows:—

“1. That the fourth plea is bad, as it discloses no ground for unconditional relief in equity against any judgment which the plaintiffs might obtain at law:

“2. That it appears by the plea, that, before any assent by the plaintiffs to hold the money for the defendant, Messrs. Montefiore & Co. revoked the authority to credit the defendant with a moiety of the gold dust consigned by Messrs. Montefiore & Co.:

“3. That the plea shows that the defendant did not comply with the terms agreed upon, by instructing the plaintiffs to credit Messrs. Montefiore & Co. with the moiety of the gold dust consigned by the defendant, and is therefore not entitled to claim the benefit of the agreement:

“4. That the remedy of the defendant, if any, is by action against Messrs. Montefiore & Co.”

(b) The points marked for argument on the part of the defendant were as follows:—

“That the plea shows a good debt in equity due to the defendant: that, if the debt sought to be set off is upon the facts stated a good debt in equity, the relief is unconditional, all that

plea, there was a good equitable assignment by Messrs. Montefiore & Co. to the defendant of *half the proceeds of the gold dust [536] consigned by them to the plaintiffs. First, there was the agreement as to the course of dealing between Messrs. Montefiore & Co. and the defendant, communicated to the plaintiffs, and their assent thereto: then, there was the invoice, which described the consignment as being on the joint account: and, lastly, there was the letter of Messrs. Montefiore & Co. to the plaintiffs, directing them when the proceeds were realized to carry one moiety to their account and the other moiety to the account of the defendant. That constituted a debt as between the plaintiffs and the defendant, and a good equitable set-off. In *Burn v. Carvalho*, 4 Mylne & Cr. 690, A., having goods in the hands of B. as his agent at a foreign port, and being under liabilities to C., by letter to C. promised that he would direct, and by a subsequent letter to B. did direct B. to deliver over the goods to D. as the agent of C. at that port. Before the delivery of the goods, a commission of bankrupt issued against A., founded upon an act of bankruptcy committed whilst his letter was on its way to B., and the goods were delivered by B. to D. in ignorance of the bankruptcy. And it was held that C. had a good title, in equity, to the goods. Lord Cottonham, in the course of the judgment, there says,—p. 702,—“In equity, an order given by a debtor to his creditor upon a third person, having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund.” And see *Hassall v. Smithers*, *12 Ves. 119; *Watson v. The Duke of Wellington*, 2 Russ. & M. 602. [WILLES, J.—This case is [537] much stronger than that.] In *Ex parte Hanson*, 12 Ves. 346, Lord Erskine, C., allowed a set-off in bankruptcy of a separate debt from the estate against a joint debt due to it: and that decision was adopted by Lord Eldon, in *Ex parte Hanson*, 18 Ves. 232. So, in *Vulliamy v. Noble*, 3 Meriv. 593, 618, it was held, that though a joint debt cannot be set off against a separate debt at law, it may in equity where there is a clear series of transactions in which joint credit has been given. And in *Clark v. Cort*, Cr. & Ph. 154, it was held, that, where there are cross-demands between two parties of such a nature, that, if both were recoverable at law, they would be the subject of legal set-off, then, if either of the demands is matter of equitable jurisdiction, the set-off will be enforced in equity.(a) [ERLE, C. J.—That will hardly be disputed.] Then it is said that the authority given by Messrs. Montefiore & Co. to the plaintiffs was revoked by their letter of the 4th of February, 1852. Under the circumstances, however, that authority was not revocable: the agents having acted upon it by communicating it to the defendant, it was no longer competent to the principals to revoke it: *Chitty on Contracts*, 6th edit. 196; *Story on*

remains to be done being to set the equitable debt off against the legal one and so close the transaction as to them: that Messrs. Montefiore & Co. had no power to revoke the authority: that, if they had such power, the money did not by the revocation become the money of Messrs. Montefiore & Co., but was held by the plaintiffs on the joint account of the defendant and Messrs. Montefiore & Co.; and that, by the original agreement, it continued assigned to, and in equity the property of, the defendant, of which the plaintiffs before action had ample notice: and that the plea is good, and that, in equity, a legal and an equitable debt may be set against one another.”

(a) And see *Cochrane v. Green*, 9 C. B. N. S. 448 (E. C. L. R. vol. 99).

Agency, § 477. Here, the authority was not in fact revoked: this is shown from the letter of the 9th of November, 1852. Then, it is said that the relief granted by a Court of equity would not be final, inasmuch as there must be a taking of accounts. One answer to that is, that the plea shows that the accounts between Messrs. Montefiore & Co. and the defendant are closed, and nothing remains to be done but *538] the payment of this specific sum. Another answer *is, that the plaintiffs have nothing to do with the accounts between these parties. The original instructions from Messrs. Montefiore & Co. to the plaintiffs made them agents for the defendant as to the one moiety. When once they had carried it to his account, they would be under no liability in respect of it to Messrs. Montefiore & Co. This is clearly a case in which the Court would be inclined to afford the defendant redress, if the law allows it.

Honeyman was heard in reply.

ERLE, C. J.—I am of opinion that our judgment should be for the defendant. It appears that Messrs. Montefiore & Co. and Baker entered into an agreement to purchase gold dust on a joint speculation, the purchases of each to be disposed of in a certain manner, and that, if the speculation should turn out to be profitable, Messrs. Montefiore & Co. should give to Baker half the profits of that which they purchased, and that Baker should give Messrs. Montefiore & Co. half the profits of that which he purchased. I do not stop to consider what interest each of the parties took in the gold dust bought by the other: but they had an agreement under which each had an interest in the profits of the other's speculations. In pursuance of this agreement, Messrs. Montefiore & Co. purchased 728 oz. of gold dust, and Baker purchased 365 oz.; and, these purchases having been made in Australia, a second agreement was come to that the gold dust so purchased should be consigned to the plaintiffs invoiced as property in which Messrs. Montefiore & Co. and Baker were jointly interested, with directions to sell it, and, after payment out of the proceeds of certain bills, to divide the net proceeds between Messrs. Montefiore & *539] Co. and Baker. I do not stop to inquire whether the *parties became tenants in common or had a joint interest in the consignments. But the plaintiffs received the 728 oz. consigned by Messrs. Montefiore & Co., with a direction from them to sell the same, and to give a moiety of the proceeds to Baker. But for the letter of Messrs. Montefiore & Co. of the 4th of February, 1852, no question would have arisen as to Baker receiving a moiety of the proceeds of that sale. Baker did consign the 365 oz. of gold dust which he had purchased to the plaintiffs for sale, and this parcel was sold by them, and a moiety of the proceeds of such sale was paid over to Messrs. Montefiore, and the other moiety to himself: so that the whole arrangement made in Australia was substantially carried out, except that the plaintiffs refuse to give Baker half the proceeds arising from the sale of the 728 oz. consigned to them by Messrs. Montefiore & Co. What the plaintiffs now rely on is, that, in Australia, Baker neglected to give them authority to credit Messrs. Montefiore & Co. with a moiety of the proceeds of the sale of the 365 oz. which he had consigned to the plaintiffs, and that, on the 4th of February, 1852 (after the invoice and Baker's letter had been received), one of the partners in the house

of Messrs. Montefiore & Co. wrote to the plaintiffs a letter in which he says,—“I have no doubt that Mr. Baker has written that half the *profits* of the 365 oz. of gold dust shipped to you is to go to Montefiore & Co. in the same way as half the profits of the 728 oz. is to go to his credit. If, however, he should not (in his haste going away to Melbourne) have done so, you will not pass the half profits of the 728 oz. to his credit.” It is said that that was a revocation of the authority previously given by Messrs. Montefiore & Co. to the plaintiffs as to the disposal of the proceeds of the 728 oz. It seems to me, however, that it was but a conditional injunction,—an *intima- [*540
tion to the plaintiffs that Messrs. Montefiore & Co. had an inter-
est in the 365 oz. consigned by Baker, and a request that, in the event of Baker's having omitted to send instructions to the plaintiff as to the disposal of that consignment, they (the plaintiffs) would protect the interests of Messrs. Montefiore & Co. in respect of the consignment of the 728 oz. The 365 oz. were, however, received by the plaintiffs and were sold, and a moiety of the proceeds handed over to Messrs. Montefiore & Co.: and so the real interest of Messrs. Montefiore & Co. has been protected. I therefore think that the plaintiff's claim to withhold from Baker the moiety of the proceeds of the 728 oz. consigned to them by Messrs. Montefiore & Co. is altogether unfounded and illusory, Montefiore's letter of the 4th of February, 1852, being only a contingent direction to the plaintiffs to protect their interests, which has become unnecessary. But, even if that were not so, and if Baker had any legal interest in the proceeds of the 728 oz. so purchased and consigned by Messrs. Montefiore & Co., still I think, upon the facts stated in the plea, that the direction to the plaintiffs to pay over to Baker half the proceeds of that consignment would give Baker a right to such moiety, and so make this a valid plea of set-off; and that the letter of the 4th of February, 1852, could not operate to vary a right once vested. As to what has been said about these being partnership accounts, it appears that all the accounts between the parties have been settled and balanced, and that this is the only unsettled item. It appears to me that the plaintiffs have no right, either in law or equity, to retain the sum in question.

WILLIAMS, J.—I am of the same opinion. Although in form an equitable plea, it is competent to the defendant to rely on it as disclosing a legal defence. I *have a difficulty in saying that this [*541
could be good as a legal plea. It is conceded that the plaintiffs
received the consignments of the 728 oz. of gold dust as agents of Messrs. Montefiore & Co. Assuming that there had been no revocation of the first direction by Messrs. Montefiore & Co. as to the disposal of the proceeds of that consignment, I am by no means satisfied that there was such privity between the plaintiffs and the defendant as would warrant the latter in treating the moiety of the proceeds of the sale in the hands of the former as a debt due to him from them. It is, however, unnecessary to consider that, because I think that, under all the circumstances stated in the plea, that which passed between Messrs. Montefiore & Co. and the plaintiffs amounted to an equitable assignment of such moiety as to the defendant, and therefore the plea constitutes a good plea of equitable set-off.

WILLES, J.—I am of the same opinion. This is a transaction which

is not at all of an extraordinary character. Two persons agree that each shall purchase goods and send them to a factor to dispose of and to divide the net proceeds between the two. The result of such an arrangement is, that the two become joint speculators in the particular transactions; and the factor, receiving goods from one of the parties, either receives them as the agent of the person who sends them, or as the agent of both. I should have thought, that, if the contracting parties had asked themselves whether they were to have the mere personal security of each other or the security of the goods, each would have said that they intended to have the joint security of the goods: and, if a jury were to pass a judgment on such a transaction, I should think they would have but little difficulty in coming to the conclusion that the factor held the goods for the two as tenants in *542] common. I do not, however, propose to rest my judgment on that point, because it is unnecessary: but, if put to a jury, I apprehend there could be no doubt as to the result. Another construction may be put upon the transaction, viz., that there was an equitable assignment of a moiety of the goods or their proceeds by each party to the other. I am not going to decide which of these two constructions is the correct one, though I incline to the former. Now, in the first state of things, you have two persons, tenants in common of goods employing an agent to sell them and to divide the net proceeds between the two. Could each of them maintain an action at law against the agent for his moiety? I apprehend he might. I am quite aware, that, if two or more persons intrust a factor or agent to sell goods on their joint account, their remedy against him for the proceeds is by a joint action. But, where the character of the dealing is this, that, at the inception of the transaction, it is agreed that the agent shall receive the consignments of each, and divide the net proceeds of each consignment between the two, I apprehend that each party might maintain an action for his proportion. Now, what is the state of facts which is disclosed by this plea? A person reading it without some previous knowledge of these transactions would hardly understand the plea. It sets out a great deal of evidence. But, upon the whole, unless there is something to affect the defendant's right to have half the proceeds of the 728 oz. consigned by Montefiore & Co., he is entitled to maintain his set-off. It appears to me that the facts set forth do not affect the defendant's right, because the right having been once vested by the agreement, no act afterwards done, by one of the parties could defeat that right; consequently, the letter of Mr. J. B. Montefiore of the 4th of February, 1852, directing that the proceeds *543] should not be applied *as originally contemplated could have no effect at all. Assuming, however, upon the other hypothesis, that there was an equitable assignment to each of a moiety of the gold dust shipped by the other, then would arise this difficulty, that he who asks for equity must do equity: and though at law Messrs. Montefiore & Co. might only have a remedy against the defendant by cross-action for neglecting to consign a moiety of his 365 oz. to them, yet, coming to a Court of equity for relief, the defendant's omission to give such direction is to be explained. You have the fact of the defendant having neglected to give that direction, and you have Mr. J. B. Montefiore's subsequent letter desiring the plaintiffs not to give the defend-

ant credit for the moiety of the proceeds of the 728 oz. in a certain event. But there are other facts which are to be taken into consideration. In the first place, there is the fact that Messrs. Montefiore & Co. were afterwards satisfied that the amount should be paid to the defendant; and, in the next place, there is the fact that the plaintiffs never acted upon Montefiore's letter of the 4th of February, 1862, but carried to the account of Messrs. Montefiore & Co. the whole of the net proceeds of the 728 oz., and also a moiety of the net proceeds of the 365 oz. It is obvious why they did this. They wanted to set off the whole against the debt due to them from Messrs. Montefiore & Co., who had become bankrupt. This is blowing hot and cold in a way which is not to be endured.

KEATING, J.—I concur with the rest of the Court in thinking that the defendant is entitled to judgment in this case. Looking at the facts disclosed by the fourth plea, I must say I think it would be a great reproach to the administration of justice if the defendant were held not to be entitled to credit to the amount claimed. *The 728 oz. of gold dust having been consigned to the plaintiffs, [*544 they assent to the appropriation of the proceeds in the manner directed by Messrs. Montefiore & Co., and communicate such their assent to the defendant. After having done that, the plaintiffs turn round and say that the authority to so appropriate the proceeds was subsequently revoked by one of the parties interested in the consignment. Without stopping to inquire whether that is the true effect of the letter of Mr. J. B. Montefiore, the question arises, how far Messrs. Montefiore & Co. had power to revoke the direction they had so given. But it seems to me that the plaintiffs cannot rely upon that letter as amounting to a revocation, because their own conduct shows that they did not act upon it as a revocation; for, they credit Messrs. Montefiore with half the proceeds of the defendant's consignment as well as with the whole of the proceeds of the consignment made to them by Messrs. Montefiore & Co. It seems to me, therefore, that the plaintiffs are precluded from entering into that question, and that the defendant is entitled to be credited with a moiety of the proceeds of both consignments pursuant to the agreement which had been made, and which, as between Messrs. Montefiore & Co. and the defendant, had been carried out to the letter.

Judgment for the defendant.

*JOHN CLARKE, Appellant; WILLIAM ROBERT HOGGINS, Respondent. Jan. 25. [*545

The mere fact of a man being instructed to deliver papers at the house of a third person is no answer to a complaint against him under the 10 & 11 Vict. c. 89, s. 28, charging him with having "wilfully and wantonly" disturbed the party and his family by violently knocking and ringing at the door at an unreasonable hour of the night.

THIS was an information laid by William Robert Hoggins, one of the police constables for the county of Salop, against the appellant, John Clarke, for an offence against "The Towns Police Clauses Act, 1847," which is incorporated with "The Wellington, Salop, Improvement Act, 1854" (17 & 18 Vict. c. xl.)

The following is a copy of the information :—

“County of } The information and complaint of William Robert Salop, to wit. } Hoggins, of Wellington, in the county of Salop, police constable, exhibited before me, the undersigned, one of Her Majesty’s justices of the peace for the said county, and acting in and for the Wellington division of the hundred of Bradford, in the said county, the 25th day of October, 1861, who saith that John Clarke, of Wellington, in the said county, tailor, on the 24th day of October, 1861, at the parish of Wellington, in the said division and county, did, in a certain street there, situate within the limits of the Wellington (Salop) Improvement Act, 1854, to the annoyance of the residents therein, wilfully and wantonly disturb certain inhabitants of the said street by pulling and ringing a certain door-bell and knocking at the door of a certain house in the occupation of one George Marcy, contrary to the statute in such case made and provided.”

The case came on for hearing before two of the justices acting in and for the Wellington division of the hundred of Bradford, in the county of Salop, on the 30th of October, 1861, when the following facts were proved :—

*546] Mr. George Marcy was formerly in partnership with *Mr. Charles Wall Hiatt, as solicitors at Wellington. The partnership had been recently dissolved; and, on the dissolution, some papers were taken away from Mr. Marcy’s office by Mr. Hiatt, and Mr. Marcy on the 22d of October, 1861, served a notice upon Mr. Hiatt, requiring him to deliver up to or leave for him at his offices in Walker Street, in Wellington, on or before the 29th day of October, 1861, certain papers and documents therein mentioned. On the 24th of October, the appellant went to Mr. Marcy’s house, which is situate within the limits of the Wellington (Salop) Improvement Act, 1854, in one of the suburbs of the town, and some distance from his office, at 9.20 P.M. Upon being told by the servant that a person was waiting to see him, Mr. Marcy went to the door, when the appellant said, “I have brought you some papers;” to which Mr. Marcy replied, “I have nothing to do with you or your papers.” The appellant said, “You refuse to receive them, then;” to which Mr. Marcy made no reply, and shut the door. The appellant then went away, and returned in ten minutes, and rang the door-bell. When the door was opened on this occasion, the appellant was standing at the door, and threw a notice, signed by Mr. Hiatt, into the hall, saying, “Perhaps you will take this notice, Mr. Marcy.” At 10 o’clock on the same night, the appellant again came to the house. Mr. Marcy’s family and servants had retired to bed, and he and his wife were going up-stairs, when the door-bell (which acts in connection with the knocker) was rung very violently. Mrs. Marcy, without opening the door, called out “Who is there?” To which the appellant replied “Clarke.” Mrs. Marcy asked what he wanted. He said, “I want to see Mr. Marcy. She replied, “He is gone to bed, and cannot be seen to-night; and if you want Mr. Marcy, you had better go to the office in the morning.” *547] The appellant replied, “I will see him to-night;” to which Mrs. Marcy replied, “The door will not be opened to any one to-night.” The appellant said, “I will stay all night till it is opened;” upon which Mrs. Marcy said, “I will send for a police constable.” The

appellant replied, "I don't care if you send for twenty policemen; I will not stir from the door till it is opened." He then commenced to ring the bell and knock at the door very violently. All the inmates in the house were disturbed; and ultimately the servants were despatched for a policeman, and the respondent returned with them in about a quarter of an hour, during the whole of which time the appellant continued pulling the bell and knocking at the door very violently, whereby the wire attached to the bell was damaged. Upon the respondent's arrival, he saw the appellant rapping and ringing at the door. The door was then opened by Mr. Marcy, when the appellant rushed against the hall, and threw in a bundle of papers and a key. Mr. Marcy pushed him out of the house, and desired the respondent to take him (the appellant) into custody. This was not done: and the appellant then left the premises, with the respondent.

It was also proved that the inmates of the adjoining house were disturbed by the knocking at the door and ringing of the bell.

On the part of the appellant, it was contended that the disturbance was not "wilful and wanton," within the meaning of the Act of parliament; and that he went to the house for the purpose of delivering certain papers, and was doing no more than his duty in ringing the bell to call the attention of Mr. Marcy or his servants; and that, when he had delivered the papers, he left the premises.

The respondent contended that the appellant had committed a breach of the law, inasmuch as he was *told that Mr. Marcy [*548 had retired to bed, and that the door would not be opened that night, and that if he wanted to see Mr. Marcy, he might do so at his office in the morning; and, after this, he was not justified in ringing the bell and creating the disturbance. The respondent also contended that, the appellant having paid two previous visits to the house, he might have transacted any business he had with Mr. Marcy or left the papers on one of those occasions, and that the last visit was a wanton and wilful disturbance.

The justices were of opinion that the evidence established the charge, and convicted the appellant, and ordered him to be imprisoned for the space of fourteen days.

Notice of appeal having been given, this case was stated for the opinion of this Court, as to whether the conduct of the appellant was a wilful and wanton disturbance, within the meaning of the Act of parliament.

Montague Smith, Q. C., for the appellant.—The justices have submitted the question of law to the Court whether the conduct of the appellant was a wilful and wanton disturbance, within the meaning of the statute 10 & 11 Vict. c. 89, s. 28: but they have not set out the facts so as to enable the Court to judge whether or not the offence has been committed. They merely say that the charge was proved; but they do not find circumstances from which the Court may judge of the bona fides of the ringing. That section enacts that "every person who in any street, to the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences, shall be liable to a penalty not exceeding 40s. for each offence, or in the discretion of the justice before whom he is convicted, may be committed to prison, there to remain for a period not exceeding fourteen

*549] days; and any constable or other *officer appointed by virtue of this or the special Act shall take into custody, without warrant, and forthwith convey before a justice, any person who within his view commits any such offence," that is to say (amongst others), "every person who wilfully and wantonly disturbs any inhabitant, by pulling or ringing any door-bell, or knocking at any door." The conviction must turn upon the word "*wantonly*," which means "without reasonable cause." [WILLES, J.—The question is, whether there was evidence from which the justices might reasonably draw the conclusion they did.] The Court cannot tell whether the act of ringing the bell was wanton or not,—unless the facts are before them to enable them to judge whether the appellant was *bonâ fide* doing his duty or wantonly intending to annoy the complainant and his family. In *Rider, app., Wood, resp.*, 1 Law Times, N. S. 30, it was held that a workman who leaves his master's employment upon a *bonâ fide* belief that his employment is regularly terminated, though it has not been so terminated in fact, is not liable to be convicted under the 4 G. 4. c. 34, s. 3: and the *bonâ fides* of his conduct is a question to be determined by the justices. Cockburn, C. J., there says: "If a man absents himself with a knowledge that his employment is not at an end, he is guilty under the statute; but, if he believes that his contract is at an end, and so leaves, he is not guilty. The convicting justices do not appear to have considered the subject in this point of view. The case therefore ought to go back to them under the 6th section of the statute,^(a) with our opinion upon this point, and then they will decide whether the appellant left the employment in the *bonâ fide* belief that he had properly put an end to it; for, if he did, he would not be guilty under this statute."

*550] **Markby*, *contra*, was not called upon.

WILLES, J.^(b)—I am of opinion that the question for our decision sufficiently appears upon the face of the case, and should be answered in accordance with the conclusion at which the magistrates arrived. The appellant, it appears, was sent by Mr. Hiatt (who had formerly been in partnership with Mr. Marcy) to that gentleman's house. Mr. Hiatt had received a notice from Mr. Marcy on the 22d of October, 1861, requiring him to deliver up or to leave for him *at his offices* on or before the 29th, certain papers and documents. On the 24th, the appellant received instructions from Mr. Hiatt to deliver a notice and certain papers to Mr. Marcy. He accordingly proceeded to Mr. Marcy's dwelling, which was situate at some distance from his offices. He arrived there at about 9.20 at night, and knocked at the door and asked for Mr. Marcy. Mr. Marcy went to the door, when the appellant said he had brought him some papers. Mr. Marcy, declining to receive them at that time, shut the door. The appellant went away and returned again in about ten minutes and rung the door-bell, and on the door being opened threw a notice into the hall. At about 10 o'clock on the same night, the appellant called again,—the family and servants having all gone to bed, and Mr. Marcy and his wife preparing to retire to rest also,—and rung the door-bell *very violently*. The adverbs are not unimportant. He was told by Mrs.

(a) *Antâ*, p. 518.

(b) *Erie*, C. J., and *Williams*, J., were sitting in the Court of Criminal Appeals.

Marcy that Mr. Marcy had gone to bed and could not be seen that night, and that, if he wanted him, he had better go to the office in the morning. The appellant insisted upon seeing Mr. Marcy, *and said he would stay all night, and would not stir from the door [*551 till it was opened. He then commenced to ring the bell and knock at the door *very violently*, disturbing all the inmates in the house, and continued so to do for about a quarter of an hour. At length a policeman was sent for; and he found the appellant still ringing the bell to the extent of injuring the wire, and knocking *violently*. It was also proved that the inmates of the adjoining house were disturbed by the knocking and ringing. Now, the objection to the conviction is, that the disturbance was not wilful and wanton within the meaning of the statute, inasmuch as the appellant went to the house for a lawful purpose, and was doing no more than his duty in ringing as he did. On the part of the respondent it was answered that the manner of performing the alleged duty was such as to bring the appellant within the statute. The justices were of opinion that the evidence established the charge, and convicted the appellant. What is the charge? It is that the appellant wilfully and wantonly disturbed Mr. Marcy and his family by knocking and ringing at his door. Taking the facts stated together with the contention before the magistrates, it is quite manifest what their decision was, viz., that the manner in which the appellant attempted to deliver the papers, and his whole conduct, were such as to bring him within the Act of Parliament. The question submitted to us virtually is, whether he was absolved by his employment by Mr. Hiatt from the consequences of his acts. The answer to that question obviously must be in the negative. That the appellant acted wilfully is clear. He rang so violently that he broke the bell-wire. The only element remaining is the wantonness. I agree with Mr. *Smith* that "wantonly" means, not having a reasonable cause. Here we come to the kernel of the case,—whether one having a lawful right to *come to another's house, has a right to stop there at a late [*552 hour at night knocking and ringing violently, though he knows that the inmates do not choose to admit him or to receive what he brings. That answers itself. Wantonness consists in the doing that which will annoy another and which the party doing it knows will produce no results to himself. I think the magistrates could come to no other conclusion than they have done; and that the question which they have put to us is capable of receiving only one answer.

KEATING, J.—I am of the same opinion. I agree with Mr. *Smith* to this extent, that, if the appellant went *bonâ fide* to deliver the papers at Mr. Marcy's house, and in carrying out that object knocked and rang louder than was reasonable, he might not come within the Act. But here the magistrates thought, and upon sufficient evidence, that the appellant's conduct was not *bonâ fide*, in the sense of intending to carry out a lawful purpose.

Appeal dismissed, without costs.

*553]

*FARRANT v. BARNES. Jan. 23.

One who employs a carrier to carry an article of such a dangerous nature as to require extraordinary care in its conveyance, must communicate the fact to the carrier, or he will be responsible for any injury which may result to the carrier or *his servants* from his omission to do so.

The defendant being desirous of sending a carboy of nitric acid to Croydon, his foreman gave it to one R., the servant of a railway carrier, who (as the railway company would only carry articles of that dangerous character on one day in each week) handed it to the plaintiff, the servant of a Croydon carrier, without communicating to him (and there being nothing in its appearance to indicate) its dangerous nature. Whilst being carried by the plaintiff to the cart, the carboy from some unexplained cause burst, and its contents flowed over and severely injured the plaintiff:—Held, that the defendant was liable for the injury thus resulting from his breach of duty.

THIS was an action brought by the plaintiff to recover damages for an injury sustained by him from the insufficient packing of a carboy of nitric acid which he was employed to carry for the defendant.

The first count of the declaration stated, that the defendant, by falsely, fraudulently, and deceitfully representing to the plaintiff that a certain carboy contained ordinary acid, and falsely, fraudulently, and deceitfully concealing from him that it contained an explosive article, dangerous to be carried, called nitric acid, caused and procured the plaintiff to carry the same for the defendant, and that the same exploded and burst whilst the plaintiff was so carrying the same, and burned the plaintiff and his clothes, &c.

The second count stated that the defendant employed the plaintiff to carry a carboy of acid for him, the defendant, on the terms that the same was not dangerous to be carried, and that the defendant had taken due and ordinary care to prevent injury to the plaintiff whilst carrying the same, and that the plaintiff then accepted and entered upon the said employment, and carried the said carboy of acid for the defendant on the terms aforesaid: Breach, that the said carboy of acid was then dangerous to be carried, and that the defendant had not taken due and ordinary care to prevent injury to the plaintiff whilst carrying the said carboy; and that, by reason of the default and breach of duty of the defendant, the said carboy of acid exploded whilst the plaintiff *554] was so carrying the *same for the defendant, and burned the plaintiff and his clothes; by means of which several premises the plaintiff had been and was permanently injured in his health, and his clothes were destroyed, and he necessarily incurred great expense for medical and other assistance, and was disabled for a long time from following his business of a carrier, and was and is otherwise injured.

The defendant pleaded,—first, not guilty,—secondly, to the first count, a traverse of the false representation,—thirdly, to the last count, a traverse of the employment of the plaintiff on the terms there mentioned,—fourthly, to the second count, that the said carboy was not dangerous to be carried, and that the defendant had taken due and ordinary care to prevent injury to the plaintiff whilst carrying the said carboy. Issues thereon.

The cause was tried before Blackburn, J., at the last Summer Assizes at Croydon. It appeared from the plaintiff's evidence, that he and his father were in the employ of one Russell, a carrier between London and Croydon; that it was part of the plaintiff's duty to collect

goods in the city and to convey them in a van to the Elephant and Castle, at Newington, where he transferred the goods he had collected to a cart in which they were conveyed to Croydon; that, on the 1st of May, 1861, whilst going his round, he met in Cannon Street, in the city, one Rayner, a carman in the employ of one Prescott, a railway carrier, who asked him if he would take a carboy (which he told him contained "acid," without more) and a bottle for Croydon; and, upon his agreeing to do so, Russell brought them and placed them in the plaintiff's van,—the carboy being a glass bottle encased in wicker-work, weighing a little over 1 cwt., and having attached to its neck a wooden label on which was written "Mr. *Wateman, dyer, [*555 Croydon. Acid;" that he proceeded with his van, containing these and various other goods, to the Elephant and Castle, at a footpace; that, on his arrival there, the other goods having first been taken out, his father removed the carboy from the front to the tail of the van, and put it upon the plaintiff's shoulder; that, as he walked with it towards the Croydon cart, part of the contents (which proved to be nitric acid, an exceedingly corrosive and dangerous liquid) escaped, and, flowing over the plaintiff, burned him so severely that he was unable to resume his employment for more than a month, and was still not perfectly cured; that the carboy appeared to be sound when he received it from Rayner; that it received no injury whilst in the van; that he never saw any label on it except the one containing the direction; and that he did not know the contents to be dangerous, and would not have taken it if he had known the fact.

The plaintiff's evidence was corroborated, with respect to what passed when Rayner delivered the carboy to him, by that of his father, and, as to what occurred at the Elephant and Castle, by the evidence of his father and two other witnesses.

Rayner, who was called as a witness for the plaintiff, stated, that, being at the warehouse of the defendant, who is a dry-salter in Lawrence Pountney Lane, on the day in question, he was asked by the foreman if he could take a carboy and bottle of acid to Croydon; that he told him he could not, as articles of that description were only carried by the railway on Mondays (when special provision was made for the carriage of dangerous articles); that, the foreman saying he particularly wished it to go, he (Rayner) asked the plaintiff if he could take it, and on his assenting, went back and told the foreman, who then gave him the carboy, which *he carried on his back [*556 to the plaintiff's van; that he (Rayner) knew that it was acid, and dangerous, but not that it was nitric acid; and that he told the plaintiff to be careful of it.

It was submitted on the part of the defendant that there was no case to go to the jury, inasmuch as there was no privity between him and the plaintiff. But the learned Judge declining to stop the case, the defendant's foreman was called. He stated that the carboy was securely packed by himself in the usual way; that the bottle was sound; and that it had on it, besides the address of the consignee, another label (that of the manufacturer) which stated what the vessel contained, and which was tied to the *handle* of the carboy. The witness was corroborated as to this latter fact by a man who was with

Rayner at the time he received the carboy at the defendant's warehouse.

Upon this, it was urged on the part of the plaintiff that there was evidence from which the jury might assume that Rayner, as the defendant's agent, fraudulently removed the label which intimated that the carboy contained nitric acid. The learned Judge, however, thought there was no evidence to justify him in leaving that question to the jury.

The learned Judge then left it to the jury to say,—first, whether they thought the defendant took precautions to make the carrier's servants aware that the article they were about to carry was dangerous,—secondly, whether the plaintiff was in fact ignorant that it was dangerous; and, if so, whether that arose from want of reasonable prudence and skill on his part,—thirdly, whether it was made out to their satisfaction that the accident occurred from the acid being improperly packed, unknown to the plaintiff: telling them that they were not to say that the accident arose from bad packing, unless affirmatively *557] satisfied that it was *so,—fourthly, what amount of compensation the plaintiff was entitled to for the injury he had sustained.

The jury answered the first question in the negative; as to the second, they found that the plaintiff was in fact ignorant, but not from want of reasonable prudence and skill on his part; and, as to the third, that it was not proved that the accident occurred from the acid being improperly packed: and they assessed the damages at 50*l*.

Pursuant to previous arrangement with the respective counsel a nonsuit was entered; leave being reserved to the plaintiff to move to enter a verdict for 50*l*. on the findings of the jury, if on those and the evidence the Court should be of opinion that there was a cause of action for the plaintiff: the Court to have all powers of amendment which the Judge had.

Parry, Serjt., in Michaelmas Term last, obtained a rule nisi accordingly, and also for a new trial on the ground that there was evidence to show that the carboy was not properly packed. He referred to *Brass v. Maitland*, 6 Ellis & B. 470 (E. C. L. R. vol. 88), and *Hutchinson v. Guion*, 5 C. B. N. S. 149 (E. C. L. R. vol. 94).

Hawkins, Q. C., and *Archibald*, now showed cause.—There was no privity between the plaintiff and the defendant. *Farrant*, the servant of *Russell*, was not employed by the defendant to carry the carboy. He intrusted it to *Rayner*, the servant of *Prescott*. The case therefore does not fall within the principle of *Langridge v. Levy*, 2 M. & W. 519,† as explained in the Exchequer Chamber in *Levy v. Langridge*, 4 M. & W. 337.† *Parke*, B., in the Court below, says: "It is clear that this action cannot be supported upon the warranty as a contract, for there is no privity in that respect between the plaintiff and the *558] defendant." *But, "as there is fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured." And the judgment was upheld in the Exchequer Chamber upon that ground. In *Winterbottam v. Wright*, 10 M. & W. 109,† the defendant contracted with the postmaster-general to provide a mail-coach to

convey the mail-bags along a certain line of road; and one Atkinson and certain other persons contracted to horse the coach along the same line, and hired the plaintiff to drive the coach: and it was held that the plaintiff could not maintain an action against the defendant for an injury sustained by him while driving the coach, by its breaking down by reason of latent defects in its construction. *Langridge v. Levy* was relied upon in support of the plaintiff's case; but the Court thought that the principle of that case ought not to be extended; and Lord Abinger said: "There is no privity of contract between the parties; and, if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action." There was no evidence of any negligence on the part of the defendant or his servants: the carboy from some unexplained cause broke, probably from having come roughly into contact with some of the articles contained in the van in which it was carried to the Elephant and Castle. No action, it is submitted, either of contract or of tort can be maintained under the circumstances. The foundation of this action must be contract; and the contract, if any, was with Russell. In the absence, therefore, of any deceit or fraud, of which there was no evidence, the nonsuit was right. *Tollit v. Sherstone*, 5 M. & W. 283,† is an authority to show that no action will lie *except as between the parties to the contract. The same principle is affirmed in *Howard v. Shepherd*, 9 C. B. 297 [*559 (E. C. L. R. vol. 67), where an attempt was made by the endorsee of a bill of lading to maintain an action upon the case for the non-delivery of the goods at the port of delivery. Williams, J., there says: "*Boorman v. Brown*, 3 Q. B. 511 (E. C. L. R. vol. 43), 2 Gale & D. 793, which was referred to in the course of the argument, simply establishes, that, if there be a contract, and something is to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the party injured,—that is, *the party to the contract*,—may recover either in tort or in contract." In *Longmeid v. Holliday*, 6 Exch. 761,† it was held that a tradesman who contracts with an individual for the sale to him of an article to be used for a particular purpose by a third person is not, in the absence of fraud, liable for injury caused to such person by some defect in the construction of the article. A declaration by husband and wife stated, that the defendant was the maker and seller of certain lamps called "*The Holliday Lamp*," and thereupon the husband bought of him one of those lamps, to be used by his wife and himself in his shop, and that the defendant then fraudulently warranted that the lamp was reasonably fit and proper for that purpose, whereas the lamp was dangerous and unsafe, by reason whereof, when the wife attempted to use the lamp, it exploded and injured her. At the trial, it appeared that the accident arose from the defective construction of the lamp, but there was no proof that the defendant knew of that defect; and the jury found that he was not guilty of any fraudulent or deceitful representation: and it was held that the action could not be maintained by the wife, there being no misfeasance towards her independently of the contract, which was *with the husband alone. [*560 [WILLES, J.—There, the defendant was unaware of the bad quality of the lamp.] The same principle was upheld in *Gerhard v.*

Bates, 2 Ellis & B. 476 (E. C. L. R. vol. 75). [WILLES, J.—And in *Wontner v. Shairp*, 4 C. B. 404 (E. C. L. R. vol. 56), and a number of other cases.] *Blakemore v. The Bristol and Exeter Railway Company*, 8 Ellis & B. 1035 (E. C. L. R. vol. 92), is to the same effect: and there Coleridge, J., in delivering the judgment of the Court, says: "It has always been considered that *Langridge v. Levy* was a case not to be extended in its application." [ERLE, C. J.—The charge is that the defendant was guilty of a breach of duty in sending a highly dangerous article without notice to the plaintiff of its character.] There was no evidence of negligence in the packing of the carboy: on the contrary, it was proved to have been packed most carefully. [ERLE, C. J.—It was more than ordinarily hazardous, however carefully it might be packed. *Dalyell v. Tyrer*, E. B. & E. 899 (E. C. L. R. vol. 96), will probably be relied on for the plaintiff; but that case falls within the principle of misfeasance mentioned in some of the authorities.]

Parry, Serjt., and *Joyce*, in support of the rule.—The argument on the part of the defendant assumes, that, if the carrier (Russell) himself were suing, the defendant would have no answer to the action. But it is said that the carrier's servant cannot maintain an action, by reason of the want of privity of contract. This, however, is not a case of contract at all. There was abundant evidence to sustain even the first count: the defendant was practically guilty of a fraudulent representation when he induced the plaintiff to take the carboy under the impression that it contained merely "acid," which, for anything that appeared, might have been vinegar. The defendant knew that the *561] railway Company would only carry the article on *particular days, and under proper precautionary arrangements, and that the carrier would not have taken it at all if he had known what it was.

The further argument was stopped by the Court.

ERLE, C. J.—The facts of the case are these:—The defendant wishing to have a dangerous article,—a carboy of nitric acid,—conveyed to Croydon, his foreman asked one Rayner, a carman in the employ of a railway carrier, to forward it. Being unable, in consequence of the Company's regulations, to forward it by railway in time to answer the defendant's purpose, Rayner applied to the plaintiff, the servant of one Russell, a Croydon carrier, to take it for him. And thus the carboy was in effect delivered by the defendant to the plaintiff to be carried to Croydon according to his accustomed course of business. The application to the plaintiff being an application to take charge of and to carry and deliver a dangerous article, it was the duty of the defendant, who knew the danger, to take care that the dangerous character of the article should be made known to all persons who were to be concerned in the carriage of it. The jury have found that he did not do so. There was no evidence as to how the accident occurred,—probably it was from the explosive nature of the article. But, be that as it may, if notice had been given of the dangerous character of the article, greater precaution possibly might have been used in the handling of it. I think the plaintiff is brought into such direct contact with the defendant that the distinction relied on to take the case out of the principle upon which the decision in *Langridge v. Levy* proceeded fails. The defendant, knowing the dangerous cha-

racter of the article, and omitting to give notice of it to the plaintiff, so that he might exercise his discretion as to whether he would take it *or not, was guilty of a clear breach of duty. The case, [562 however, upon which I rely is *Brass v. Maitland*, 6 Ellis & B. 470 (E. C. L. R. vol. 83). There the defendants caused a dangerous substance to be put on board the plaintiff's ship as bleaching powder, without giving him any notice of its dangerous qualities; and by reason of the insufficiency of the casks in which the article was contained, the contents escaped, and damaged the rest of the cargo: and it was held by Lord Campbell and Wightman, J., that there is an implied undertaking on the part of shippers of goods on board a general ship that they will not deliver to be carried on the voyage packages of a dangerous nature, which those employed on behalf of the shipowner may not on inspection be reasonably expected to know to be of a dangerous nature, without giving notice. The present case falls even within the principle there laid down by Crompton, J., who held the liability to be more limited. Lord Campbell says, in giving the judgment of himself and Wightman, J., that "where the owners of a general ship undertake that they will receive goods and safely carry them and deliver them at the destined port, I am of opinion that the shippers undertake that they will not deliver to be carried in the voyage packages of goods of a dangerous nature, which those employed on behalf of the shipowner may not on inspection be reasonably expected to know to be of a dangerous character, without expressly giving notice that they are of a dangerous character." Crompton, J., says: "Probably an engagement or duty may be implied, that the shipper will use and take due and proper care and diligence not to deliver goods apparently safe but really dangerous, without giving notice thereof; and any want of care in the course of the shipment in not communicating what he ought to communicate, might be negligence for which he would be liable: but, *where no negligence is alleged, or where the plea negatives any alleged negligence, [563 I doubt extremely whether any right of action can exist." Here, it is expressly found by the jury that the defendant took no precaution to inform the plaintiff of the dangerous nature of the article in question when he intrusted it to him to carry. It seems to me that the principle on which the decision of *Brass v. Maitland* is founded, taking it in the narrowest and most limited way, authorizes us to say that the defendant in this case is responsible for the injury which the plaintiff has sustained, and that consequently the verdict must be entered for the latter for the amount of damages assessed by the jury.

WILLES, J.—I am of the same opinion. I apprehend, that, as matter of legal duty, a person who gives another dangerous goods to carry, goods which require more care and caution than ordinary merchandise, and which are likely in the absence of such caution to injure persons handling them, is bound to give notice of their dangerous character to the party employed to carry them, and is liable for the consequences which are likely to ensue from the omission to give such notice. A simple instance of this, is the case of a merchant putting on board a ship goods which are liable under certain circumstances to spontaneous combustion, or which in the absence of extraordinary care are likely by escaping to damage other parts of the cargo. It is clear

that such a person would be liable to an action at the suit of any one who might be injured by his wrongful omission. This doctrine, though more fully considered in the recent case of *Brass v. Maitland*, 6 Ellis & B. 470 (E. C. L. R. vol. 88), is by no means modern. It was considered in *Williams v. The East India Company*, 3 East 192. The *564] plaintiff there *failed in the result for want of proof that the goods were put on board without due notice of their dangerous character: but the Court treat the obligation of the shipper as not resting upon contract, but upon the duty to give notice. Lord Ellenborough says: "In order to make the putting on board wrongful, the defendants must be conscious of the dangerous quality of the article put on board; and if, being so, they yet gave no notice, considering the probable danger thereby occasioned to the lives of those on board, it amounts to a species of delinquency in the persons concerned in so putting such dangerous article on board, for which they are criminally liable, and punishable as for a misdemeanor at least." The Court there treat it as a duty which is owed to all persons who may be injured by the neglect to give notice. What is there laid down may not, so far as the supposed criminal responsibility goes, be applicable to a case like this: but it clearly shows that there would be a civil responsibility for the non-performance of this duty by the defendant or his agent. The case of a shipment of dangerous goods may be an extreme case: but it serves to illustrate the general principle, that, wherever a person employs another to carry an article which from its dangerous character requires more than ordinary care, he must give him reasonable notice of the nature of the article, and that, if he fails to do so, he is responsible for the probable consequences of his neglect. The only remaining question, then, here is, whether the injury of which the plaintiff complains was the probable result of the want of notice. The plaintiff was injured whilst carrying this carboy of nitric acid in the way in which goods of the like bulk are ordinarily carried, viz., on the shoulder. If he had known the nature of the article, it is extremely improbable that he *565] would have carried it in *that manner. When, therefore, we take into account the fact that the plaintiff was the servant of the carrier, and that the carboy was delivered to him to be carried in the ordinary way, it would seem to be a waste of words to argue that the injury was the result of the defendant's omission to give notice.

KEATING, J.—I am of the same opinion. It is clear that persons sending dangerous articles by a carrier are bound to give notice of their character. I did not understand Mr. *Archibald* to contend that there was no duty to give such notice, but that the duty was confined to giving notice to the person employed to carry them, and did not extend to his servants. Without defining the extent to which the duty of the defendant ought to go, I entertain no doubt that it goes to the extent of including the case of the present plaintiff. He was the person to whom the defendant caused the article to be delivered for the purpose of being carried. The defendant knew he was employed to carry and deliver it. Rule absolute.

A dealer in drugs who carelessly is liable to one injured by using it as labels a poison as a harmless medicine, such medicine, though it may have

passed through many intermediate imposed by the law to avoid acts in sales before reaching the one injured—their nature dangerous to the lives of the liability not arising out of any con- others: *Thomas v. Winchester*, 10 N. tract or privity, but out of the duty Y. (2 Seld.) 397

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*POOLEY v. BROWN. Jan. 15.

[*566]

It is the duty of the party who receives a foreign bill in England to see that the adhesive stamp is cancelled pursuant to the Stamp Act, 17 & 18 Vict. c. 83, s. 5, under pain of disability to make the instrument available for any purpose.

The plaintiff in April, 1860, purchased of the defendant, without recourse, a bill purporting to be drawn by A. in Brussels upon B. in London. Through the default of both parties, the adhesive stamp was not cancelled at the time of the transfer, pursuant to the 17 & 18 Vict. c. 83, s. 5. In April, 1861, B. became bankrupt, and proof of the bill against his estate was rejected in consequence of the neglect to cancel the stamp, and the name of A. turned out to have been forged. The plaintiff then called upon the defendant to return him the price he paid for the bill, as upon a failure of consideration:—

Held, by Erle, C. J., and Keating, J.,—Williams, J., dissenting,—that the non-observance of the requirements of the statute disabled the plaintiff from maintaining the action.

And, held, by the whole Court, that, at all events, he was precluded by his own laches from recovering back the price he had paid for the bill.

THIS was an action for money had and received, &c. Plea, never indebted.

The cause was tried before Erle, C. J., at the sittings in London after last Trinity Term. The facts which appeared in evidence were as follows:—In April, 1860, one Lindo brought to the plaintiff eight several bills of exchange, amounting together to the sum of 358*l.*, which purported to be drawn by one Meyer at Brussels upon and accepted by Messrs. Gilmore & Co. in London, and to be endorsed by Meyer in Brussels, and asked him to discount them for the defendant, but without recourse to him. The plaintiff consented to do so, and accordingly gave the defendant a check for 322*l.* 19*s.* 4*d.* The bills had affixed on them adhesive stamps pursuant to the 17 & 18 Vict. c. 83, s. 3, (a) but it did not at the time occur to either of the parties to cancel the stamps, as required by s. 5. (b)

(a) Which enacts that “the duties by this Act granted in respect of bills of exchange drawn out of the United Kingdom shall attach and be payable upon all such bills as shall be paid, endorsed, transferred, or otherwise negotiated within the United Kingdom, wheresoever the same may be payable, and the said duties shall be denoted by adhesive stamps, to be provided by the Commissioners of Inland Revenue for that purpose, and to be affixed to such bills as hereinafter directed.”

(b) Which enacts that “the holder of any bill of exchange drawn out of the United Kingdom, and not having a proper adhesive stamp affixed thereon as herein directed, shall, before he shall present the same for payment, or endorse, transfer, or in any manner negotiate such bill, affix thereon a proper adhesive stamp for denoting the duty by this Act charged on such bill; and the person who shall endorse, transfer, or negotiate such bill, shall, before he shall deliver the same out of his hands, custody, or power, cancel the stamp so affixed, by writing thereon his name, or the name of his firm, and the date of the day and year on which he shall so write the same, to the end that such stamp may not be again used for any other purpose; and, if any person shall present for payment, or shall pay, or endorse, transfer, or negotiate any such bill as aforesaid whereon there shall not be such adhesive stamp as aforesaid duly affixed, or if any person who ought as directed by this Act to cancel such stamp in manner aforesaid shall refuse or neglect so to do, such person so offending in any such case shall forfeit the sum of 50*l.*: and no person who shall take or receive from any other person any such bill as aforesaid, either in

*567] *It turned out that the name of Meyer as the drawer and endorser of these bills was forged. Gilmore & Co., the acceptors, having subsequently become bankrupt, the plaintiff, in April, 1861, sought to prove for the amount of the bills against their estate; when it was discovered that the stamps had not been cancelled, and the proof was rejected. The plaintiff then demanded back the sum which he had paid the defendant for the bills, as upon a failure of consideration.

On the part of the defendant, it was objected, that, by reason of the non-compliance with the statute, to which he was himself a party, it was not competent to the plaintiff to use the bills as evidence; that the plaintiff, by reason of his own laches, whereby he had materially *568] altered the position of the defendant, had *disabled himself from recovering back the money; and that, as there was no mistake of fact, the money was not recoverable back.

A verdict was taken for the plaintiff for 322*l.* 19*s.* 4*d.*, leave being reserved to the defendant to enter a nonsuit, if the Court should be of opinion that the plaintiff was not entitled to maintain the action.

C. Wood, in Michaelmas Term last, accordingly obtained a rule nisi to enter a nonsuit, on the grounds,—“first, that the bills were inadmissible in evidence,—secondly, that the plaintiff was a party to the violation of the statute, and caused his own loss,—thirdly, delay in applying to the defendant for payment,—fourthly, that, if any mistake, it was one of law, and not of fact.”

J. Brown (with whom was *Hawkins*, Q. C.), on a former day in this term, showed cause.—The bills have become valueless in consequence of the defendant's neglect to do that which the statute required of him, and consequently there has been a total failure of consideration. The plaintiff intended to purchase available securities: he has not got what he bargained for. The case somewhat resembles that of *Young v. Cole*, 3 N. C. 724 (E. C. L. R. vol. 32), 4 Scott 489 (E. C. L. R. vol. 36). There, the plaintiff, a stockbroker, sold for the defendant four Guatemala bonds, and paid him the amount: the bonds, after they had been in the hands of the purchaser two days, were discovered to be not marketable (not bearing a stamp as required by the government of that state); whereupon the plaintiff took them back, and reimbursed the purchaser: and it was held that the plaintiff was entitled to recover from the defendant, in an action for money had and received, the amount he had paid to the defendant. “The plaintiff,” *569] says Tindal, C. J., “delivered the money to the defendant on an understanding that the bonds he had received from the defendant were real Guatemala bonds, such as were saleable on the Stock Exchange. It seems, therefore, that the consideration on which the plaintiff paid his money has failed as completely as if the defendant had contracted to sell foreign gold coin and had handed over counters instead. It is not a question of warranty; but whether the defendant has not delivered something which, though resembling the article contracted to be sold, is of no value.” *Gompertz v. Bartlett*, 2

payment or as security, or by purchase or otherwise, shall be entitled to recover thereon, or to make the same available for any purpose whatever, unless at the time when he shall so take or receive such bill there shall be such stamp as aforesaid affixed thereon and cancelled in the manner hereby directed.”

Ellis & B. 849 (E. C. L. R. vol. 75), is singularly applicable. There, an unstamped bill of exchange, endorsed in blank, purporting to be a foreign bill, was sold, without recourse, by the holder, who was not a party to the bill. It proved to have been drawn in this country, and was therefore unavailable for want of a stamp, and could not be enforced against the parties. The vendor and purchaser at the time of the sale were both alike ignorant of this defect. And it was held that the purchaser was entitled to recover back the price paid from the vendor, on the ground that the article sold as a foreign bill did not answer the description by which it was sold; though it would have been otherwise (the sale being without any warranty, and there being no fraud), had the latent defect been one consistent with the article being a foreign bill. "If," says Lord Campbell, "it really had been a foreign bill, any secret defect would have been at the risk of the purchaser: but this is not a case in which an article answering the description by which it is sold has a secret defect, but one in which the article is not of the kind which was sold. I think, therefore, that the money paid for it may be recovered as paid in mistake of facts" (a) *Young v. Cole is there referred to and approved. [*570 Gurney v. Womersley, 4 Ellis & B. 133 (E. C. L. R. vol. 82), is also a strong authority in favour of the maintenance of this action. That, like this, was an action for money had and received, with a plea of never indebted. The plaintiffs and defendants were both money-dealers and bill-brokers in London. A. was a customer of the defendants. N. & Co. were a firm of high repute in London. One A. brought to the defendants for discount an acceptance of N. & Co. The defendants took it to the plaintiffs for discount, but refused themselves to endorse or guaranty the bill. The plaintiffs agreed to take it at the ordinary rate of discount, expressly on the credit of N. & Co.'s name, and gave the defendants their check for the amount, and the defendants gave their own check to A. for the amount at a higher rate of discount. After this, several other acceptances of N. & Co. were discounted in the same manner. All these were genuine, and were honoured. A. afterwards brought to the defendants what purported to be a bill drawn on N. & Co. for 3050*l.*, endorsed specially to A., and accepted by N. & Co. It was carried by the defendants to the plaintiffs, who agreed to take it. The defendants then procured A. to endorse it in blank, gave it to the plaintiffs, received their check for the proceeds less discount at one rate, and gave A. their own check for the proceeds less discount at a higher rate. It turned out that all the names on this bill, except A.'s own, were forgeries. A. was convicted of the forgery, and became bankrupt. The action was brought to recover the amount given by the plaintiffs for this bill. At the trial it was proved that in London all bill-brokers are also money-dealers, themselves discounting bills with their own money for their customers. Sometimes a bill-broker does not discount a bill himself, but finds a capitalist *who will take the bill without recourse to the bill-broker. In such cases, the customer is never introduced to the capitalist, but the capitalist gives his check to the bill-broker for the amount of the bill less the discount agreed on between the bill-broker and capitalist, and the bill-broker gives his check to the customer for the

(a) See the cases collected in Addison on Contracts, 2d edit. 152 et seq.

amount of the bill less the discount agreed on between the bill-broker and customer; which rates of discount are not the same. The Judge (Lord Campbell) told the jury, that, on the undisputed facts, though there was no endorsement or guarantee, and therefore no warranty of the solvency of the parties to the bill, there was a total failure of consideration, and the plaintiffs were entitled to recover back the money paid for the bill from the party with whom the transaction was: and he left it to the jury to say whether the transaction was one between the plaintiffs and the defendants, or one between the plaintiffs and A. through the defendants as agents merely. The jury having found a verdict for the plaintiffs, it was held, upon a motion for a new trial,—that the verdict was warranted by the evidence, the contract in such cases being between the capitalist and the bill-broker, and not between the capitalist and the bill-broker's customer,—and that, though A.'s endorsement was genuine, and there was so far recourse on the bill, yet that the undisputed facts showed that the bill was taken as an acceptance of N. & Co., and that the genuineness of their acceptance was the essence of the description, and that consequently the direction that there was a total failure of consideration was right. It is clear, therefore, that there was a total failure of consideration here, and that the plaintiff is entitled to recover back his money, unless his right is defeated by some or one of the points urged by the defendant. Now,

*572] the first *objection is, that, by reason of the 5th section of the 17 & 18 Vict. c. 83, the documents were not admissible in evidence. The same objection, however, might have been urged in *Gompertz v. Bartlett*, 2 Ellis & B. 849 (E. C. L. R. vol. 75). [WILLES, J.—And in *Milnes v. Duncan*, 6 B. & C. 671 (E. C. L. R. vol. 13), 9 D. & R. 731 (E. C. L. R. vol. 22).] In *Smart v. Nokes*, 7 Scott N. R. 786, 6 M. & G. 911, it was expressly decided that the insufficiency of stamp did not preclude the bill being given in evidence. It will be said that the parties are in *pari delicto*. The statute, however, casts upon the transferrer the duty of cancelling the stamp, under a penalty. [WILLES, J.—The question would equally arise if the seller of the bill were residing at Hull and the buyer in London. This is a mistake of fact, and not of law, and therefore the mere fact of the delay, the party having the means of knowledge of the defect, will not preclude the plaintiff from recovering the money back: *Kelly v. Solari*, 9 M. & W. 54;† *Milnes v. Duncan*, 6 B. & C. 671, 9 D. & R. 731; *Lucas v. Worswick*, 1 M. & Rob. 293; *Townsend v. Crowdy*, 8 C. B. N. S. 477 (E. C. L. R. vol. 98).

Manisty, Q. C., and *Wood*, in support of the rule.—In *Young v. Cole*, *Gompertz v. Bartlett*, and *Gurney v. Womersley*, the thing agreed to be sold was something altogether different from the thing which was handed over, and therefore the consideration wholly failed. Here, however, the very thing which the defendant undertook to sell was sold. There was no fraud, no misrepresentation. Both parties acted in ignorance of the duties which the Act of Parliament imposed upon them. As to the admissibility of the bills in evidence, it is to be observed that the plaintiff is equally guilty of negligence, and the author of his own loss. The statute says that the person transferring *573] the bill without cancelling the stamp shall be liable to a *penalty of 50*l.*, and the person receiving it shall not be entitled

"to recover thereon," or "to make the same *available for any purpose whatever*," unless the stamp be affixed and cancelled. The decision in *Smart v. Nokes*, 7 Scott N. R. 786, 6 M. & G. 911 (E. C. L. R. vol. 46), turned upon the 19th section of the 31 G. 3, c. 25, which enacted that "no bill of exchange liable to the duties by that Act imposed shall be pleaded or given in evidence in any Court, or admitted in any Court *to be good, useful, or available* in law or equity," unless duly stamped. [ERLE, C. J.—"Good, useful, or available" *as a bill*.] Precisely so. Erskine, J., there says: "Looking at the words of the statute, and taking the whole clause together, it is quite clear that the legislature intended to prevent the production in evidence of an unstamped bill or note with a view to relying upon it as a binding and obligatory instrument." The test, as is said in *Simpson v. Bloss*, 7 Taunt. 246, 2 Marsh. 542, whether a demand connected with an illegal transaction, is capable of being enforced at law, is, whether the plaintiff requires any aid from the illegal transaction to establish his case. [ERLE, C. J.—The party who passes the bill without cancelling the adhesive stamp is regarded by the legislature as the offender, and a penalty of 50*l.* is imposed on him. According to your argument, if the value of the bill exceeds 50*l.*, the recipient of the bill incurs the greater loss. The bill becomes a source of delinquency in the hands of every person to whom it comes.] If the stamps had been cancelled, as they would have been if the plaintiff had been as vigilant as he ought to have been, all he could have got for the bills would have been such a dividend as the estate of *Gilmore & Co.* might produce: whereas, now he is seeking to get back the whole sum he paid for the bills. There has, no doubt, been negligence on both sides: but, super-added to *his* negligence, the plaintiff has further been guilty of laches in holding the bills so long without discovering the blemish; and, by this negligence, he has materially altered the position of the defendant, who, if his attention had been called to it promptly, might have remedied it. *Stray v. Russell*, 28 Law J., Q. B. 279, *Russell v. Stray*, 29 Law J., Q. B. 115, and *Remfry v. Butler*, Ellis B. & E. 887 (E. C. L. R. vol. 96), were also referred to.

Cur. adv. vult.

ERLE, C. J.—This was a rule to enter a verdict for the defendant. The facts were, that the plaintiff, in April, 1860, bought of the defendant for 323*l.* certain foreign bills of exchange purporting to be drawn by Meyer, in Brussels, on *Gilmore & Co.*, of London: the defendant omitted to cancel the adhesive stamp, according to the 17 & 18 Vict. c. 83, s. 5, when he delivered them to the plaintiff (the cancellation having escaped the attention of each party at the time of the sale). *Gilmore & Co.* before the maturity of the bills became bankrupt. In April, 1861, they proposed a dividend; and these bills were tendered for proof, but rejected because the stamp was not cancelled. Then the plaintiff demanded, and brought this action for, the sum which he had paid to the defendant for the bills, on the ground that the consideration had wholly failed,—citing *Young v. Cole*, 3 N. C. 724 (E. C. L. R. vol. 32), 4 Scott 489 (E. C. L. R. vol. 36), where the purchaser of Guatemala bonds was held entitled to rescind the purchase and recover back the price, because they were not stamped with a Guatemala stamp,—and *Gurney v. Womersley*, 4 Ellis & B. 133 (E.

C. L. R. vol. 82), where the plaintiff rescinded the contract and recovered the purchase-money paid for some bills which purported to be accepted by one Van Notter, but which (as to that name) were forgeries.

*575] In answer to this claim of the plaintiff, the *defendant has relied on two grounds,—first, that the consideration for which the plaintiff paid his money has not failed; on the contrary, the specific things which were the subject of the contract of sale were delivered and received, viz., the bills drawn by Meyer & Co., of Brussels, on Gilmore & Co., of London. At the time of the contract, they had all the qualities of the things which the defendant intended to sell and the plaintiff to buy. The defect arose in the process of delivery.

When foreign bills sold are delivered, the Stamp Act, 17 & 18 Vict. c. 83, commands the seller to cancel the adhesive stamp before he delivers, and the buyer to see that this has been done before he receives them. Each party in this case omitted to perform the duty so commanded: and the statute has declared the consequences which are to follow from this inattention, viz., the seller is to forfeit 50*l*. to the Queen, and the buyer is to lose the capacity of making the bills available for any purpose. Although the cancelling is required from the seller, the seeing that it has been done before he receives it is required from the buyer. Each of the actors has his duty enforced by the above-mentioned consequences from neglect: and the defendant contended upon the argument before us that there was nothing in the statute which laid the whole of the loss on the seller.

If this ground failed, then the second ground on which the defendant relied was, the time that had elapsed before the plaintiff claimed to rescind the contract and to recover back the purchase-money, and the change in the circumstances of the parties during that time. The plaintiff had kept the bills for a year; the defect was always apparent if he had known the law; and his ignorance of the law would be no excuse for his omitting to make his claim. During that time the *576] *acceptors had become bankrupt, and the drawer had not been made to pay; and the situation of the defendant may have been materially altered for the worse by the delay; while the plaintiff, by rescinding the contract, would gain so much more than he would have got with a valid transfer, as the price he paid exceeds the dividend he would receive under the bankruptcy. If any action lay, it would be more reasonable to sue in such case for the true loss rather than for the original price as money had and received.

Under these circumstances, we are all of opinion that the plaintiff had no right to rescind the contract of sale, and that the defendant is entitled to succeed on the second ground above mentioned.

My Brother Keating and myself are also of opinion that the defendant is entitled to succeed on the first ground as above stated; but from this opinion my Brother Williams dissents.

WILLIAMS, J.—I agree with my Lord and my Brother Keating that this rule ought to be made absolute, but on the second ground only.

If the plaintiff had, within a reasonable time after he had received the bills from the defendant, and without any delay prejudicial to the latter, required him to take and return the purchase money, on the

ground that he had omitted to cancel the stamps, I think the plaintiff might have maintained this action, because I think there was an implied understanding when the bills were sold they were to be not merely foreign bills of exchange, but negotiable and available bills, as both parties believed they were; and they have turned out not to be such bills, by reason of the defendant's neglecting to cancel the stamps before he parted with the bills, as required by the statute. I think, therefore, the plaintiff would have had a right to recover back the *purchase-money, either by reason of the consideration [*577 having totally failed, or by reason of his having paid it in mistake of facts, as put by Lord Campbell in *Gompertz v. Bartlett*, 2 Ellis & B. 849 (E. C. L. R. vol. 75). I am strengthened in this view of the case by considering, that, if the vendee of a bill sold and delivered under such circumstances could be compelled to keep it, the bill must by the terms of the statute be wholly unavailable in his hands; whereas, if he be allowed to return it to the vendor, the latter may at all events sue the acceptor on it. Some doubt, perhaps, may exist whether he could, by transferring it subsequently to another vendee, or another holder for value, render it available in the hands of the latter, because the statute says that no person who shall take such a bill from another shall be allowed to make it available, unless at the time he takes it it shall bear a stamp *cancelled in the manner directed*, i. e. (as it might, perhaps, be contended), cancelled by the first holder before he has delivered the bill out of his hands to any one. But I can find nothing in the Act which would prevent the vendor, though he may have transferred the bill, in violation of the statute, without cancelling the stamp, from afterwards suing the acceptor on it, if the bill gets back to his (the vendor's) hands.

It was argued on behalf of the defendants, that it is unjust to allow the plaintiff to recover back the whole price of the bills, because he will thereby be put into a better plight than if the defendant had complied with the statute; in which case the defendant would only have been able to obtain a dividend under the acceptor's bankruptcy. But the answer to this argument is, I think, that, in truth, the defendant is merely remitted to the condition of being the holder of the bills of which, by reason of his own neglect to cancel the stamps, he has in the result never legally ceased to be *holder. And no injustice is done to him thereby, if he is so remitted without [*578 any injurious delay.

In the present case, however, I agree with the rest of the Court in thinking that the action is not maintainable, because the vendee of the bills neglected for an unreasonable time to return them to the vendor, and must, under the circumstances, have thereby prejudiced the vendor as to his position in respect both of the drawer and the acceptors of the bills.

WILLES, J.—Not having heard the whole of the argument, I take no part in the judgment in this case. Rule absolute.(a)

(a) By the 33d section of the 24 & 25 Vict. c. 91, it is enacted, that, "in any case where an adhesive stamp used for denoting any stamp duty is required by law to be cancelled by any person by writing thereon his name or the name of his firm, it shall be sufficient, if, instead of the name in full, the initials thereof shall be so written, or shall be stamped or impressed in ink thereon, together with any other particulars specially required by law to be written thereon, provided that by means thereof the stamp shall be effectually obliterated and cancelled so as

not to admit of its being used again, anything in any Act to the contrary notwithstanding; and, where the adhesive stamp on any foreign bill or promissory note shall, on such bill or note being received by any person who shall be or become the bona fide holder thereof, be effectually obliterated, and shall purport and appear to be duly cancelled, the same shall, so far as relates to such holder, be deemed to be sufficiently cancelled: Provided, that where any such bill or note when so received by any such person as last aforesaid shall have affixed thereto a proper and sufficient adhesive stamp, but such stamp shall not be duly cancelled, it shall be competent to the holder to cancel the same as if he were the person first negotiating the bill or note; and, upon his so doing, such bill or note shall be deemed to be duly stamped, and shall be as valid and as available by such holder and any *prior or subsequent holder as it would have *579] been if the stamp had been affixed and cancelled as by law required by the first holder. anything in any Act to the contrary notwithstanding; but nothing herein contained shall relieve any person who ought to cancel such stamp from any penalty incurred by not cancelling the same as required by law." .

PARRY v. The CROYDON COMMERCIAL GAS AND COKE COMPANY. Jan. 25.

By the Croydon Improvement Act, 10 G. 4, c. lxxiii., a penalty of 200*l.* is imposed upon any gas or other company for suffering any impure matter to flow into any stream, &c., *to be sued for by any common informer.* By the 21st section of the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), a like penalty is imposed for the same offence,—such penalty (by s. 22) "*to be recovered by the person into whose water such substance shall be conveyed, or whose water shall be fouled by any such act.*"—

Held, that, the latter provision was pro tanto a repeal of the former.

THIS was an action by a common informer against the Croydon Commercial Gas and Coke Company, upon the 10 G. 4, c. lxxiii. (the Croydon Lighting and Improvement Act), for permitting offensive matter to flow into certain streams.

The declaration stated, that the defendants, within six calendar months next before the commencement of the suit, to wit, on the 2d of August, 1861, they then being persons making, furnishing, and supplying gas used and burnt for lighting divers highways, streets, and houses, manufactories, buildings, and other premises within the limits of an Act made in the 10th year of the reign of King George the Fourth, intituled "An Act for lighting, watching, and improving the town of Croydon, in the county of Surrey, for providing lodgings for the Judges at the assizes holden in the said town, and for other purposes relating thereto, did drain and convey, and caused and suffered to be drained and conveyed and to run and flow divers washings and other waste liquids, substances, and things which arose and were made in the prosecution of the said gasworks, into certain rivers, brooks, and running streams, canals, reservoirs, aqueducts, feeders, *580] *ponds, and spring-heads, and into divers drains, sewers, and ditches communicating with them, the said rivers, brooks, and running streams, canals, reservoirs, aqueducts, feeders, ponds, and spring-heads, and did and caused to be done divers annoyances, acts, and things to the water contained in them, whereby the water contained in them, and divers parts thereof, were spoiled, fouled, and corrupted, contrary to the form of the statute in such case made: whereby and by force of the said statute the defendants forfeited and became liable to pay to the plaintiff 200*l.*; yet the defendants had not paid the same: and the plaintiff claimed 200*l.*

Second plea,—that the acts and things complained of and each and every of them were and was committed and happened after the passing and coming into operation of “The Croydon Commercial Gas and Coke Act” (10 & 11 Vict. c. cxxiv.), and after the 1st day of August, 1849; and that the said acts and things and each and every of them were and are, and was and is, such and the like acts and things, act and thing, as are and is described and mentioned in the 21st section of the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), and no other; and that the plaintiff is not and never has been the person into whose water the washings or other substances produced in making or supplying gas in such act mentioned (being the washings and other waste liquids, substances, and things in the declaration mentioned), were conveyed or flowed, or the person whose water was fouled.

To this plea the plaintiff demurred, the ground of demurrer stated in the margin being, “that the plaintiff’s right to sue for the penalty given by the 10 G. 4, c. lxxiii., s. 27, is not taken away by the 10 & 11 Vict. c. cxxiv., incorporating the 10 & 11 Vict. c. 15, s. 21, and that the two penalties are cumulative.”

**Grant*, in support of the demurrer.(a)—The plaintiff sues for a penalty incurred by the defendants under the 27th section of the Croydon Lighting and Improvement Act, 10 G. 4, c. lxxiii., which enacts, “that, if the said commissioners [the commissioners for carrying the Act into operation], or any company or companies, or any other person or persons whatsoever, making, furnishing, or supplying any gas used or burnt for lighting any highway, street, or place, or any house, manufactory, building, or other premises within the limits of this Act, shall at any time drain or convey, or cause or suffer to be drained or conveyed, or to run or flow, any washings or other waste liquids, substances, or things whatsoever, which shall arise or be made in the prosecution of the said gasworks, into any river, brook, or running stream, canal, reservoir, aqueduct, feeder, pond, or spring-head, or into any drain, sewer, or ditch, communicating with any of them, or do or cause to be done any annoyance, act, or thing to the water contained in any of them, whereby the water contained therein, or any part thereof, shall or may be spoiled, fouled, or corrupted, then and in every such case the said commissioners, or any such company or companies, or other person or persons as aforesaid, shall forfeit and pay for every such offence the sum of 200*l.*; and such penalty and forfeiture shall and may be sued for and recovered, together with full costs of suit, in any of His Majesty’s Courts of record at Westminster, by action of debt or on the case, or by bill, *plaint, or information, &c.; and such penalty shall be paid to the person or persons who shall inform or sue for the same.” The defendants are incorporated for the supply of gas to Croydon and its vicinity by the 10 & 11 Vict. c. cxxiv., with which act the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), and the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), are incorporated. And the question will be, whether the 27th section of the

(a) The points marked for argument on the part of the plaintiff were as follows:—

“1. That the plaintiff’s right to sue for the penalty given by the 10 G. 4, c. lxxiii., s. 27, is not taken away by the 10 & 11 Vict. c. cxxiv., incorporating the 10 & 11 Vict. c. 15, s. 21.

“2. That the penalties given by the said two Acts are cumulative.”

first-mentioned Act is repealed by any of the provisions of the last-mentioned Act. The material sections are the 21st, 22d, and 29th. The 21st section enacts, that "if the undertakers shall at any time cause or suffer to be brought or to flow into any stream, reservoir, or aqueduct, pond, or place for water, or into any drain communicating therewith, any washing or other substance produced in making or supplying gas, or shall wilfully do any act connected with the making or supplying of gas, whereby the water in any such stream, reservoir, aqueduct, pond, or place for water shall be fouled, the undertakers shall forfeit for every such offence the sum of 200*l*." The 22d section enacts that "the said penalty of 200*l*. shall be recovered, with full costs of suit, in any of the superior Courts, *by the person into whose water such washing or other substance shall be conveyed or shall flow, or whose water shall be fouled by any such act as aforesaid*; but such penalty shall not be recoverable unless it be sued for during the continuance of the offence, or within six months after it shall have ceased." And the 29th provides that "nothing in this or the special Act contained shall prevent the undertakers from being liable to an indictment for a nuisance, or to any other legal proceeding to which they may be liable, in consequence of making or supplying gas." It is submitted that these provisions in the general Act do not repeal that contained in the

*583] special Act, but that the second penalty is cumulative. It is a well-known rule of construction, that a subsequent general Act of Parliament does not repeal or affect a prior special Act, in the absence of express words of reference: *Fitzgerald v. Champneys*, 2 Johnson & H. 31. Vice-Chancellor Wood in a very elaborate judgment goes through the principal authorities. "The Act for the abolition of fines and recoveries (3 & 4 W. 4, c. 74)," he says, "provides that 'every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of, for an estate in fee simple absolute, the land entailed, as against all persons claiming the land entailed by force of any estate tail which shall be vested in or might be claimed by, or which, but for some previous Act, would have been vested in, or might have been claimed by, the person making the disposition at the time of his making the same, and also as against all persons, including the King's most excellent majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of any such estate tail;' yet no one could argue successfully that those words, large as they are, would affect the entails made by special Acts of Parliament, such as the Marlborough, the Wellington, or the Shrewsbury entails. The reason in all these cases is clear. In passing the special Act, the legislature had their attention directed to the special case which the Act was meant to meet, and considered and provided for all the circumstances of that special case; and, having done so, they are not to be considered, by a general enactment passed subsequently, and making no mention of any such intention, to have intended to derogate from that which, by their own special Act, they had thus carefully supervised and regulated."

*584] [ERLE, C. J.—Are there any words in the later Act showing an intention on the part of the legislature to make an alteration in respect of the penalty? That is the question. By the 27th section of the special Act, the penalty is recoverable by action at the

suit of a common informer. By the 22d section of the general Act, the penalty given by s. 21 (which is a penalty given in respect of the same offence as that specified in the special Act) is recoverable by action at the suit of the party injured. Does this latter supersede the former, or is it cumulative? WILLES, J.—The rule is “*Generalia specialibus non derogant*.” This is a case in which the second Act has a special provision in regard to the same matter.] In the case of *The Trustees of the Birkenhead Docks v. Laird*, 4 De Gex, M’N. & G. 732, it was held that a private Act of Parliament does not repeal a former private Act by implication: therefore, where a private Act of Parliament gave power to Commissioners to construct a sea-wall, the property in which was to be vested in them, with liberty to proprietors of adjoining lands to purchase portions of the wall, and to make openings in it under the superintendence of the engineer of the Commissioners,—it was held, that, under a subsequent Act empowering a dock company to take some adjoining lands and to make such works for the purposes of their undertaking “as they might deem expedient,” the power thus conferred was subject to the provisions of the former Act. [WILLIAMS, J.—The 23d section of the 10 & 11 Vict. c. 15, provides, that, “in addition to the said penalty of 200*l*. (and whether such penalty shall have been recovered or not), the undertakers shall forfeit the sum of 20*l*. (to be recovered in the like manner) for each day during which such washing or other substance shall be brought or shall flow as aforesaid, or the act by which such water shall be fouled shall continue after the expiration of *twenty-four hours from [585 the time when notice of the offence shall have been served on the undertakers by the person into whose water such washing or other substance shall be brought or shall flow, or whose water shall be fouled thereby, and such penalty shall be paid to such last-mentioned person.” Surely that is inconsistent with the provision in the former Act.] It is a totally separate enactment as to the 20*l*. per day.

Honyman (with whom was *Philbrick*), contra, was not called upon.^(a)

ERLE, C. J.—This is an action brought by a common informer against the defendants upon the 27th section of the Croydon Local Improvement Act, 10 G. 4, c. lxxiii., for fouling the water of certain streams with gas-refuse, whereby they are said to have incurred under that Act a penalty of 200*l*. No doubt, if there had been no subsequent legislation on the subject, that enactment being distinct, the defendants would have been liable. But the defendants by their plea rest their defence upon a subsequent statutory provision, which they contend deprives the common informer of the right to sue, and gives the penalty to the party *injured by the wrongful act. The de- [586 fendants are incorporated by an Act of 10 & 11 Vict. c. cxxiv.,

(a) The points marked for argument on the part of the defendants, were as follows:—

“1. That the defendants, as a Company formed under the provisions of the 10 & 11 Vict. c. cxxiv., are not subject to the provisions of the 10 G. 4, c. lxxiii., s. 27:

“2. That the latter Act is repealed by the former as to all offences included in The Gasworks Clauses Act, 1847, s. 21:

“3. That the defendants’ plea shows that the alleged offence was so included, and that they are therefore not liable to the penalty sued for:

“4. That, having regard especially to the introductory recital of The Gasworks Clauses Act, 1847, it is evident that the legislature did not intend the two penalties to be cumulative.”

the 1st section of which incorporates therewith the Gasworks Clauses Act, 1847. That general Act, must, therefore, be read as part of the Croydon Gas Act: and the question is whether the enactments of that Act with regard to the penalty and its application are inconsistent with those of the earlier local Act. The title of the Act is, "An Act for consolidating in one Act certain provisions usually contained in Acts authorizing the making of gasworks for supplying towns with gas." The Act has several subdivisions or chapters, each headed with the general subject. The space between the 20th and 21st sections has the heading,—“And with respect to the provision for guarding against fouling water, or other nuisance from the gas, be it enacted as follows,”—That must be taken to be an intimation to all gas companies of the penalties to which they will be liable for fouling water. The 21st section then proceeds to enact, that, “if the undertakers shall at any time cause or suffer to be brought or to flow into any stream, reservoir, or aqueduct, pond, or place for water, or into any drain communicating therewith, any washing or other substance produced in making or supplying gas, or shall wilfully do any act connected with the making or supplying of gas, whereby the water in any such stream, reservoir, aqueduct, pond, or place for water shall be fouled, the undertakers shall forfeit for every such offence the sum of 200*l*.” and by the 22d section such penalty is recoverable “by the person into whose water such washing or other substance shall be conveyed or shall flow, or whose water shall be fouled by any such act as aforesaid.” It is clear to my mind that the legislature intended by this provision to take from the common informer the penalty imposed by any former Acts upon *587] this particular offence, and to give it to the party damaged by the nuisance. And this construction is strengthened by the 23d section, which was referred to by my Brother Williams during the argument, and which superadds a further penalty of 20*l* per day for the continuance of the cause of complaint, “to be recovered in the like manner.” Several following sections provide for the digging up roads, &c., for the purpose of examining the pipes, &c., and for the payment of the expenses of such examination. Seeing all this special legislation specifically applicable to gas companies and to the fouling of water by them, it seems to me that that special legislation was intended and is sufficiently declared to be the only provision they are to look to for the penalties to which they are amenable. The preamble of the general Act,—which recites that “it is expedient to comprise in one general Act sundry provisions usually contained in Acts of Parliament authorizing the construction of gasworks for supplying towns with gas, and that as well for avoiding the necessity of repeating such provisions in each of the several Acts relating to such undertakings, as for insuring greater uniformity in the provisions themselves,”—is strongly confirmatory of this view. The defendants, acting under an Act of Parliament which incorporates these general provisions, are liable to the penalties thereby imposed, and to those penalties alone, and in the manner there pointed out. Their liability to actions at the suit of a common informer may continue as to all injuries not provided for by the specific legislation. For these reasons, I am of

opinion that our judgment upon this demurrer ought to be for the defendants.

The rest of the Court concurring,

Judgment for the defendants.

***HAMMACK, Administratrix, v. WHITE. Jan. 14. [*588**

The defendant bought a horse at Tattersal's, and the next day took him out to "try" him in Finsbury Circus, a much-frequented thoroughfare. From some unexplained cause, the horse became restive, and, notwithstanding the defendant's well-directed efforts to control him, ran upon the pavement and killed a man:—Held, that these facts disclosed no evidence of negligence which the Judge was warranted in submitting to the jury.

THIS was an action upon Lord Campbell's Act, 9 & 10 Vict. c. 93, by Mrs. Hammack, the widow and administratrix of William Hammack, to recover damages against the defendant for having by his negligence caused the death of the intestate.

The declaration alleged that the deceased, in his lifetime, was lawfully passing in and along a certain common and public highway, and that the defendant so carelessly, negligently, and improperly rode a certain vicious horse in the said highway, that, by and through the carelessness, negligence, and improper conduct of the defendant in that behalf, the said horse ran with great force and violence upon and against the deceased, and cast and threw him down and so injured him that the deceased, within twelve months next before the action, died.

The defendant pleaded not guilty: whereupon issue was joined.

The cause was tried before the Recorder of London in the Lord Mayor's Court, when the following facts appeared in evidence:—

On the 7th of May, 1861, the deceased was walking on the foot-pavement in Finsbury Circus, when he was knocked down and kicked by a horse on which the defendant was riding. He was picked up and carried to St. Bartholomew's Hospital, where he died on the 16th in consequence of the injuries he had sustained.

It appeared that the defendant had bought the horse the day before at Tattersal's, and had taken it out to try it, when the horse became unmanageable and swerved from the roadway on to the pavement, notwithstanding the defendant's efforts to restrain him. *It did not appear that the defendant had omitted to do anything he [*589 could have done to prevent the accident: but it was insisted on the part of the plaintiff, that the mere fact of the defendant's having ridden in such a place a horse with whose temper he was wholly unacquainted, was evidence of negligence. Some reliance was also placed upon the fact of there being certain police notices affixed at various parts of the circus, cautioning all persons not to exercise horses there.

The learned Recorder, being of opinion that there was nothing in the evidence to warrant a jury in finding that the defendant had been guilty of negligence, directed a nonsuit.

Patchett, in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground of misdirection. He referred to *Weaver v. Ward*,

2 Rol. Abr. 548, Hob. 134, F. Moore 864, Michael v. Alestree, 2 Lev. 172, 1 Vent. 295, 3 Keble 650, and Leame v. Bray, 3 East 593.

H. James now showed cause.—If a man intentionally commits an unlawful act, he is responsible for all the consequences which may reasonably be expected to flow from such an act. So, if he is guilty of negligence in the doing of a lawful act, and the natural and proximate result is injury to a third person, he is liable: see *Scott v. Shepherd*, 2 Sir W. Bl. 892, and the authorities collected in the notes to that case in *Smith's Leading Cases*, 4th edit. 343. In all these cases the intention of the party was to do the act from which the mischief ensued. There was no such intentional acting here. There was nothing to show that the horse was ridden negligently, or that the rider knew him to be vicious or restive. In *Gibbons v. Pepper*, 1 *590] Lord Raym. 38, 4 Mod. 404, 2 Salk. 637, it seems to *have been held that a person who causes the accident by spurring the horse would be liable. [WILLES, J.—Incautiously using the spur at an inauspicious moment was recently held in this Court to be some evidence of negligence: see *North v. Smith*, 10 C. B. N. S. 572 (E. C. L. R. vol. 100).] Negligently driving on a dark night on the wrong side of the way, was held in *Leame v. Bray*, 3 East 593, to render the party liable in trespass, though he were no otherwise blameable. In *Michael v. Alestree*, 2 Lev. 172, 1 Vent. 295, the defendant was guilty of negligence. So also in *Wakeman v. Robinson*, 1 Bingh. 213 (E. C. L. R. vol. 8), 8 J. B. Moore 63 (E. C. L. R. vol. 17), where the defendant pulled the wrong rein. *Templeman*, app., *Haydon*, resp., 12 C. B. 507 (E. C. L. R. vol. 74), is the strongest case against the defendant. The marginal note there is scarcely borne out by the facts. The appeal was dismissed on the ground that there was no erroneous decision (by the County Court Judge) in point of law. The remarks of Maule, J., show that the Court considered there was evidence of negligence on the part of the defendant. "Where," he says, "a cart is defective, or a horse is possessed of certain qualities, it may be negligence on the part of the driver if he does not deal with them according to their respective conditions or qualities. If a horse is full of life and spirit, it necessarily demands more care than one which is sluggish and worn out. So, a cart that is infirm requires to be driven more steadily than one which has undergone less wear and tear. And it may well be that a failure of conduct in respect of either would amount to negligent driving." *May v. Burdett*, 9 Q. B. 101 (E. C. L. R. vol. 58), which is frequently cited, is hardly applicable here: the injury there arose from a monkey, an animal not domesticated. Nor is this like the case of *Christie v. Griggs*, 2 Campb. 79, where the action was founded on the contract of a stage-coach proprietor safely to carry his *591] passengers. It may be urged that *the defendant was not lawfully riding under the circumstances in Finsbury Circus; and the Metropolitan Police Act, 2 & 3 Vict. c. 47, s. 54, may be relied on. That section prohibits, amongst other things, the "exercising, training, or breaking of any horse" in any thoroughfare or public place within the limits of the metropolitan police district: but, to bring a person within that section it must be shown that he is merely exercising, training, or breaking the animal, to the annoyance of the inhabitants or passengers, which there is no pretence for saying that

this defendant was doing. The true principle which governs these cases is that which was laid down in a recent case in this Court, of *Cotton v. Wood*, 8 C. B. N. S. 568 (E. C. L. R. vol. 98), viz., that the Judge will not be justified in leaving the case to the jury where the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant.

Patchett, in support of the rule.—This case falls precisely within the rule in *Michael v. Alestree*, 2 Lev. 172, 1 Ventr. 295. That was an action on the case "for that the defendants (the master and his servant), in Lincoln's Inn Fields, a place where people are always going to and fro about their business, brought a coach with two ungovernable horses, et eux improvide, incaute, et absque debita consideratione ineptitudinis loci, there drove them, to make them tractable and fit for a coach, and the horses, because of their ferocity, being not to be managed, ran upon the plaintiff, and hurt and grievously wounded him." It was moved in arrest of judgment, "that no sciens is here laid of the horses being unruly, nor any negligence alleged, but, e contrà, that the horses were ungovernable." But judgment was given for the plaintiff, "for, 'tis alleged that it was improvide et absque debita consideratione *ineptitudinis loci." The real question [*592 is, on whom lies the burthen of proof. The declaration states that the deceased was lawfully passing in and along a public highway, and that the defendant so carelessly, negligently, and improperly rode a vicious horse there, that, through that carelessness and negligence, the deceased lost his life. The evidence to support that was, that the deceased was walking on the foot-pavement in a populous thoroughfare, when he was knocked down and killed by a horse which the defendant was "trying," having only purchased him the day before at Tattersal's, where it is well known that all horses are sold without warranty. That, it is submitted, was ample primâ facie evidence of negligence. [WILLIAMS, J.—The defendant was carried against the deceased by a horse which all his apparently well-directed efforts were ineffectual to control.] What more could the plaintiff do than show that the deceased was in a place where he might reasonably conceive himself to be safe, and that the defendant rode where he had no right to be? [ERLE, C. J.—The fair result of the plaintiff's evidence was, that the defendant was riding along quietly, when, for reasons not given, the horse became restive.] If the defendant had been called, it might have come out on cross-examination that he incautiously used a whip or a spur. [ERLE, C. J.—The question before us, is, whether, on the evidence then before him, the Judge was right in point of law in nonsuiting the plaintiff.] Sir James Mansfield, in *Christie v. Griggs*, 2 Campb. 79, says: "I think the plaintiff has made a primâ facie case by proving his going on the coach, the accident, and the damage he has suffered. It now lies on the other side to show that the coach was as good a coach as could be made, and that the driver was as skilful a driver as could anywhere be found. What other evidence can the plaintiff give? The *passengers were probably all sailors, like [*593 himself: and, how do they know whether the coach was well built, or whether the coachman drove skilfully? In many other cases of this sort, it must be equally impossible for the plaintiff to give the evidence required. But, when the breaking down or overturning of

a coach is proved, negligence on the part of the owner is implied. He has always the means to rebut this presumption, if it is unfounded: and it is now incumbent on the defendant to make out that the damage in this case arose from what the law considers a *mere accident*." [WILLIAMS, J.—That case went upon the carrier's undertaking that he would provide for the safe conveyance of his passengers, as far as human care and foresight could go.] Still, the principle of the ruling is applicable here. In the case of a railway accident, one who sues the Company for an injury sustained by him from a collision or the train getting off the rails, makes out a sufficient *prima facie* case when he has proved the collision or the departure from the rails and the amount of injury: *Carpue v. The London and Brighton Railway Company*, 5 Q. B. 747 (E. C. L. R. vol. 48), D. & M. 608, 3 Railw. Cas. 692. [WILLIAMS, J., referred to *Perren v. The Monmouthshire Railway and Canal Company*, 11 C. B. 855 (E. C. L. R. vol. 73).] In *Skinner v. The London, Brighton, and South Coast Railway Company*, 5 Exch. 787,† a declaration against a railway Company stated that the plaintiff, at the request of the defendants, became a passenger in one of their trains, to be carried, &c., and that, through the carelessness, negligence, and improper conduct of the defendants, the train in which the plaintiff was such passenger struck against another train, whereby the plaintiff was injured. At the trial, it appeared that the accident was occasioned by the train in which the plaintiff was, running against a train standing at the station, it being then dark: and it was held, *594] that *the mere fact of the accident having occurred was *prima facie* evidence of negligence on the part of the defendants. Negligence in all these cases is purely for the jury: *Crofts v. Waterhouse*, 3 Bingh. 319 (E. C. L. R. vol. 11), 11 J. B. Moore 133 (E. C. L. R. vol. 22). The evidence given on the part of the plaintiff here was at all events enough to call upon the defendant to prove that he was riding a reasonably manageable horse. [ERLE, C. J.—The railway cases do not serve you. I do not assent to the doctrine that mere proof of the accident throws upon the defendants the burthen of showing the real cause of the injury. All the cases where the happening of an accident has been held to be *prima facie* evidence of negligence, have been cases of contract. WILLIAMS, J.—The Lord Chief Justice in terms lays down the rule, in *Cotton v. Wood*, 8 C. B. N. S. 568 (E. C. L. R. vol. 98), in the way he has just expressed himself.] The question is, whether the learned Recorder was justified in saying that there was no evidence of negligence here,—whether there was not enough to call upon the defendant for an answer, as in the case of *Gibbon v. Pepper*, 2 Salk. 637, 1 Lord Raym. 38, 4 Mod. 404.

ERLE, C. J.—I am of opinion that this rule should be discharged. The action is brought for damage caused by the negligence of the defendant: and the question is whether we can see upon the notes of the learned Recorder any evidence of negligence on the part of the defendant which that learned Judge ought to have left to the jury. I am of opinion that the plaintiff in a case of this sort is not entitled to have his case left to the jury unless he gives some affirmative evidence that there has been negligence on the part of the defendant. The sort of negligence imputed here is, either that the defendant was unskilful in the management of the horse, or imprudent in taking a vicious ani-

mal, or one *with whose propensities or temper he was not sufficiently acquainted, into a populous neighbourhood. The [*595 evidence is, that the defendant was seen riding the horse at a slow pace, that the horse seemed restless and the defendant was holding the reins tightly, omitting nothing he could do to avoid the accident; but that the horse swerved from the roadway on to the pavement, where the deceased was walking, and knocked him down and injured him fatally. I can see nothing in this evidence to show that the defendant was unskilful as a rider or in the management of a horse. There is nothing which satisfies my mind affirmatively that the defendant was not quite capable of riding so as to justify him in being with his horse at the place in question. It appears that the defendant had only bought the horse the day before, and was for the first time trying his new purchase,—using his horse in the way he intended to use it. It is said that the defendant was not justified in riding in that place a horse whose temper he was unacquainted with. But I am of opinion that a man is not to be charged with want of caution because he buys a horse without having had any previous experience of him. There must be horses without number ridden every day in London of whom the riders know nothing. A variety of circumstances will cause a horse to become restive. The mere fact of restiveness is not even *prima facie* evidence of negligence. Upon the whole, I see nothing which the learned Recorder could with propriety have left to the jury.

WILLIAMS, J.—I am entirely of the same opinion. Precisely the same question arose at the trial of this cause as would have presented itself if the defendant had stood indicted for manslaughter. It has been contended that there was evidence for the jury that *the [*596 defendant was guilty of negligence in not using due care or having sufficient skill to govern a vicious horse. I am clearly of opinion, that, if this had been a trial for manslaughter, the evidence which was given here could not have been left to a jury. It is said that *prima facie* the defendant was guilty of negligence because he was wrongfully on the foot-pavement. But the fact of his being on the foot-pavement is nothing unless he was there voluntarily: and, to say the least, it is quite as consistent with the facts proved that he was there involuntarily as that he was there by his own mismanagement. I would refer to the principle alluded to by the Lord Chief Justice in *Cotton v. Wood*, 8 C. B. N. S. 568 (E. C. L. R. vol. 98), which it is most important to keep in mind in all these cases, viz., that, where the evidence given is equally consistent with the existence or non-existence of negligence, it is not competent to the Judge to leave the matter to the jury. It was further contended that there was evidence to warrant the jury in coming to the conclusion that the defendant was riding a horse which he knew not to be fit for the purpose. I am not sure that Mr. *James* is not right in saying that this declaration does not charge anything of that sort. But, at all events, there was no evidence of a scienter.

WILLES, J.—I am of the same opinion, though I must own that at the outset I was much inclined to entertain a contrary view. The discussion, however, which has taken place has satisfied me that I ought to concur with my Lord and my learned Brothers. The cir-

cumstance which very much weighed with me, was, that here was a man riding on the foot-pavement, and therefore *primâ facie* in the wrong. But then it must be remembered that the witness who proved that fact proved that he was there against his will, that the horse *597] *showed symptoms of running away, and that the defendant was doing his best to hold him in, and in fact doing all he reasonably could to prevent the accident. He was there by the will of a horse which was running away with him and resisting his efforts to restrain him. The injury occurred from the vicious and unmanageable character of the horse. But, as has already been pointed out, the fact of the defendant's riding an unmanageable horse in a public street is not to fix him with responsibility unless it is shown that he knew the horse to be vicious and unmanageable: and that is negatived by the evidence here. It may be that a horse is unmanageable in consequence of want of care or skill on the part of the rider. Want of care is excluded by the evidence. Want of skill is matter of opinion: and it is not enough that the evidence is consistent with either view. It was very much urged, that, as the defendant had only bought the horse the day before, he was culpably negligent in trying him in such a place. But that would be imposing a restriction upon the rights of the owners of horses for which I find no warrant in the law. I cannot hold that the defendant is liable on that ground, when there was no reason, so far as the evidence goes, for supposing that the animal was a dangerous one. Upon these grounds, I am satisfied that I was wrong in thinking there was any evidence which could properly be left to the jury. It is perfectly demonstrable that there was not. There is yet another point in which I wish to make a remark, viz. whether the same evidence which is required in these cases would suffice to convict a man of manslaughter. I agree with my Brother Williams that that would be so in this case. In 1 East's P. C. 263, 264, treating of homicide, it is laid down that "the greatest possible care is not to be expected, nor is it required: but, whoever seeks to *598] *excuse himself for having unfortunately occasioned by any act of his own the death of another, ought at least to show that he took that care to avoid it which persons in similar situations are most accustomed to do,"—rather indicating that this should be shown by evidence on the part of the person charged. The practice is otherwise. I agree that the question would be the same in this case. But there has been a good deal of discussion in modern cases as to whether or not juries on questions of this sort ought to be told to look at the evidence as if they were dealing with a criminal case. It is of course immaterial from which side the evidence comes which shows that the homicide is excusable. But, as at present advised, I cannot think that the jury in a civil action should be told that the question is the same as if the party was upon his trial for manslaughter. In a recent case in the Privy Council,—Cheyt Ram, app., Chowdhree Nowbut Ram, resp., 7 Moore's Indian Appeal Cases 207,—on a question involving the genuineness or forgery of an instrument sued upon, which the Courts in India had opportunity of personally inspecting, and held genuine, it was held to be necessary that the evidence impeaching the document be clear and strong to justify the appellate Court in reversing the decree appealed from. Guarding myself with

this qualification, I agree with the rest of the Court in thinking that the evidence in this case was not such as ought to have been submitted to the jury.

KEATING, J.—I am of the same opinion. If the evidence had shown that this horse was a quiet and manageable horse, and that the deceased at the time he met with the injury which resulted in his death was walking on the foot-pavement, I must own I should have thought that there was *prima facie* *enough to call upon the defendant to show that he had used due care and skill, because then it would have been more consistent to assume that the accident arose from his want of care and skill. But here the evidence gets rid of that difficulty; for, it shows that the beast was restless at the time, that he took fright, and that the defendant against his will, and not negligently, inasmuch as he was doing all he could to avoid it, got placed in the position from which the mischief arose. That being so, the case is left in this position, that it is equally probable that there was not as that there was negligence on the part of the defendant. The plaintiff, therefore, fails to sustain the issue the affirmative of which the law casts upon her.

Rule discharged.

MARKIN v. ALDRICH, Clerk. Jan. 17.

The final order under the 7 & 8 Vict. c. 96, s. 22, constitutes an absolute bar to the actions in respect of which it is a protection,—though not in terms an order for distribution as well as for protection.

And it is not the less a final order because it contains also an adoption of the proposal for payment of the debts made in the petition.

The statutes 5 & 6 Vict. c. 146 and 7 & 8 Vict. c. 96, do not authorize the assignees to take the profits of a benefice, there being no provision therein equivalent to the 55th section of the old Insolvent Act, 1 & 2 Vict. c. 110.

THIS was an action by the drawer against the acceptor of a bill of exchange for 43*l.* 13*s.* 6*d.*, drawn on the 30th of January, 1858, payable two months after date; with a count for goods sold, interest, and money found due upon accounts stated.

Plea, except as to 5*l.* 18*s.* 3*d.*, part of the money claimed, that, after the contracting and accruing of the debts therein pleaded to respectively, and before action, a petition for the protection of the defendant from process was duly and according to the form of the statutes in such case provided presented by the *defendant to the County Court of Suffolk holden at Woodbridge, then having jurisdiction in the matter of the said petition, and a final order for protection and distribution was duly made in the matter of the said petition by the said Court, then having jurisdiction in that behalf; and that the alleged debts therein pleaded to respectively were contracted and accrued before the date of the filing of the said petition, and were inserted with all requisite particulars respecting the same in the schedule of the defendant's debts annexed to the said petition, according to the provisions of the said statutes.

The plaintiff for a replication to the first plea said, that the said order in the said plea mentioned, and therein alleged to be a final

order for protection and distribution, was and is in the words, letters, and figures following, and not otherwise, that is to say,—

"In the County Court of Suffolk holden at Woodbridge, in the said county.

"In the matter of the petition of W. W. Aldrich, of Boyton, in the county of Suffolk, clerk and surrogate of the Archdeaconry Court of Suffolk and Consistorial Court of Norwich, an insolvent debtor, and not being a trader within the meaning of the statutes now in force relating to bankrupts:

"Be it remembered that the said W. W. Aldrich, having presented his petition for protection from process to this honourable Court, and such petition having been duly filed in Court, and the said petitioner having duly appeared and been examined touching his debts, estate, and effects, and it appearing to the undersigned Judge of the said County Court that the said W. W. Aldrich, by virtue of the statutes in that case made and provided, is entitled to the protection of his person from being taken or detained under any process whatever in *601] respect of the several debts and claims *hereinafter mentioned, a final order is hereby made, to protect the person of the said W. W. Aldrich from being taken or detained under any process whatever in respect of the several debts and sums of money due or claimed to be due at the time of filing his petition from the petitioner to the several persons named in his schedule as creditors, or as claiming to be creditors for the same respectively, or for which such persons shall have given credit to the said petitioner before the time of filing his petition, and which were not then payable, and as to the claims of all other persons not known to the said petitioner at the time of making this order, who may be endorsees or holders of any negotiable security set forth in his said schedule: And it is hereby directed that the proposal of the said petitioner set forth in his petition, for the payment of his debts, be carried into effect in the following manner, that is to say, to pay the sum of 80*l.* per annum by half-yearly payments until the debts in his schedule are liquidated,—the first half-yearly payment to be made on the 1st day of November, 1862, and the next payment on the 1st day of May following. Given under my hand this 16th day of June, 1858.

"JOHN WORLLEDGE,

"Judge of the said County Court."

And the plaintiff said that he never at any time consented or agreed to the said proposal of the defendant in his said petition mentioned, nor did he the plaintiff ever at any time agree or consent to the making of the said order for carrying into effect the said proposal of the defendant in the manner therein mentioned, or has he ever consented thereto: And the plaintiff further said that he never has accepted or received any portion of the said half-yearly payments, or any sum or sums whatever towards or in liquidation of the said debts and causes *602] of action in the *declaration mentioned, and to which the first plea is pleaded, but the same remain and still are wholly due, unpaid, and unsatisfied.

To this replication the defendant demurred, the ground of demurrer stated in the margin being, "that the order set out, coupled with the matters stated in the plea, is a bar to the causes of action pleaded to." Joinder.

And for a second rejoinder the defendant said, that, under and by virtue of the statutes in that behalf, certain estate and effects of the defendant became upon the filing of the said petition vested in the registrar of the said Court, and applicable by him according to the said statutes.

The plaintiff demurred to the second rejoinder to the first replication, the ground of demurrer stated in the margin being, "that the facts stated in the second rejoinder do not make the order mentioned in the first replication a bar to the action." Joinder.

G. B. Hughes (with whom was *Grove*, Q. C.), for the plaintiff.—This is a mere protection from process, and not pleadable in bar. And, assuming that an order for distribution by the assignees would be pleadable in bar, an order for carrying a proposal into effect is not. As to the first point, there is authority; as to the second, there is none. 1. The first case on the subject is that of *Toomer v. Gingell*, 3 C. B. 322 (E. C. L. R. vol. 54), where this Court held that the order under the 22d section of the 7 & 8 Vict. c. 96, only enured to protect the person of the petitioner, and was not pleadable in bar. Then came the case of *Platel v. Beville*, 2 Exch. 508,† where the Court of Exchequer held that a final order for protection under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, not only protects the person of the insolvent, but constitutes an absolute bar to an action for *the debt as to which it is a protection, and may be so pleaded. [*603 The question came again before this Court in *Phillips v. Pickford*, 9 C. B. 459 (E. C. L. R. vol. 67), but it was decided upon another point, viz. that, to constitute a bar, the plea must not only show that the debt was contracted before the filing of the petition, but also that it was inserted in the schedule. The Court expressly abstain from binding themselves by the authority of *Platel v. Beville*. *Cresswell, J.*, in delivering the judgment of the Court, says: "The question principally considered in that case was, whether a final order obtained under the 7 & 8 Vict. c. 96, constitutes an absolute bar to an action for the debts as to which it is a protection, or operates only as a protection of the person of the insolvent. The Court of Exchequer decided that it is an absolute bar: and, after hearing a very able argument on that question, we are disposed to agree with that opinion, but abstain from binding ourselves by a decision on the point, inasmuch as it appears to us, that, assuming the final order to be an absolute bar in all cases where it is a protection at all, still the plea is bad. In *Platel v. Beville*, the attention of the Court does not appear to have been drawn to the limited operation of the final order made under the 7 & 8 Vict. c. 96, viz. that it applies only to debts in the schedule, and not to all debts contracted before the filing of the petition." There is no authority in the Queen's Bench one way or the other. That the final order was pleadable in bar under the 5 & 6 Vict. c. 116, s. 10, is clear. The question is, whether the express provision in that section is to be imported into the 22d section of the 7 & 8 Vict. c. 96, the words of which are,—"that the final order to be made under the provisions of the said Act, as amended by this Act, shall protect the person of the petitioner from being taken or detained under any process *whatever in the cases hereinafter mentioned, that is to say, from all process in respect of the several debts and sums" [*604

of money due or claimed to be due at the time of filing the petition from such petitioner to the several persons named in his schedule as creditors," &c. That in terms only purports to be a protection to the person. That the latter Act does in some respects modify the former, is clear from the judgment of Rolfe, B., in *Platel v. Bevill*. The 5 & 6 Vict. c. 116, by ss. 7 and 9, vests all the present and future estate of the petitioner in his assignees, but they only get possession of it by filing a claim: whereas, under s. 4 of the 7 & 8 Vict. c. 96, the property of the petitioner vests in the assignees by virtue of their appointment. Then comes an important provision, which is not noticed in the judgment in *Platel v. Bevill*, viz. the 73d section, which enacts, "that, in construing this Act, the word 'property' shall mean and include all the real and personal estate and effects of the petitioner within this realm and abroad (except the wearing apparel and such other articles, of the value in that behalf aforesaid, as may by this Act be excepted from the operation of the said recited Act and this Act), and all the future estate, right, title, interest, and trust of such petitioner in or to any real or personal estate and effects within the realm or abroad which such petitioner may purchase, or which may revert, descend, be devised or bequeathed, or come to him before he shall have obtained such final order, and all debts due or to be due to such petitioner before he shall have obtained such final order:" so that the assignees under the later Act have no power to take after-acquired property. [WILLES, J.—I was under an impression that that point was settled by the judgment in *Platel v. Bevill*. Rolfe, B., says, —2 Exch. 519,†—"An alteration is made in the effect of the assignment to the official or creditors' *assignee by s. 11, by vesting
*605] powers in them; by s. 17, vesting in them goods in the apparent ownership of the insolvent. But, with respect to property acquired after the final order, no alteration seems to have been made. By the first Act, on the passing of the final order, all the estate, *present and future*, of the insolvent vests in the assignees, as under a fiat; but then, by s. 9, the assignees must file a claim in order to take after-acquired effects, and cannot take possession but by an order from the Commissioner or the Court of review: so that, both sections being read together, it seems that the assignees take all present property absolutely, and have a right to obtain all that is subsequently acquired by the insolvent. This is the only way of reconciling these contradictory clauses. The 4th section, explained by the 73d, leaves no doubt on this question under the second Act; for, the appointment vests the property of the insolvent, that is, all present and future estate which shall come to him *before he shall have obtained the final order*, leaving all subsequently-acquired property to be dealt with under the former Act, for the 9th section of that Act is certainly not repealed. In our view, the rights of the assignees to after-acquired property are the same under both Acts." ERLE, C. J.—The 74th section of the 7 & 8 Vict. c. 96 enacts that "nothing herein contained shall be construed to repeal, affect, or in any manner alter the provisions of the said recited Act (5 & 6 Vict. c. 116), except so far as herein above expressly provided, or except so far as the provisions of the said recited Act may be inconsistent or at variance with the provisions of this Act." Your argument has not convinced me: and,

if it had, I should still adhere to the decision of the Court of Exchequer in *Platell v. Bevill*, with which this Court seemed disposed to agree in *Phillips v. Pickford*.] 2. Then, assuming that an order *for [*606 protection and distribution would, under the 7 & 8 Vict. c. 96, be pleadable in bar, is this order, which is not for distribution, but for carrying out a proposal by the petitioner to pay an annual sum in liquidation of his debts, pleadable in bar? That has never yet been decided. In *Platel v. Bevill*, it is assumed that the final order should be a bar, where all the property of the petitioner is placed at the disposal of his creditors. But, under an order like this, if the party should afterwards come into possession of property to any amount, there would be no means of making it available to the satisfaction of his debts. By the 12th section of the 5 & 6 Vict. c. 116, the final order is only to be varied if the Commissioner shall think fit, if he sees reason to believe "that the petitioner had not before the making of the order sought to be rescinded made a full disclosure of his estate, effects, and debts, or had since the making of such order not given notice to the assignees of any property after acquired by him." In *Miles v. Pope*, 5 C. B. 294 (E. C. L. R. vol. 57), where a plea alleging that the defendant obtained a final order for *protection and distribution*, under the 7 & 8 Vict. c. 96, was held not to be proved by the production of a mere order for personal protection under the 28th section of that statute, Maule, J., says: "The plea is only to be understood as an answer to the action, on the ground that it sets up an order that the person of the petitioner should be finally protected, and his estate distributed. To constitute a defence, the plea must be understood to be substantially a plea under the 5 & 6 Vict. c. 116, s. 10. The order produced is not an order for distribution at all, but a mere order for protecting the person of the petitioner, under s. 28 of the 7 & 8 Vict. c. 96, which cannot be set up as a bar to an action." [ERLE, C. J.—The 9th section is a distinct enactment that the after-acquired property *shall vest in the assignees. The hardship you suggest, there-fore, is only imaginary.] This being the case of a clergyman, [*607 and there being no provision in the 5 & 6 Vict. c. 116 or the 7 & 8 Vict. c. 96, equivalent to the 55th section of the 1 & 2 Vict. c. 110,(a) there are no means of reaching his property: see *Parry v. Jones*, 1 C. B. N. S. 339 (E. C. L. R. vol. 87).

Hannen, contra, was not called upon.(b)

ERLE, C. J.—In this case an order has been made under the 7 & 8

(a) Which enacts "that nothing in this Act contained shall extend to entitle the assignee or assignees of the estate and effects of any such prisoner, being a beneficed clergyman or curate, to the income of such benefice or curacy for the purposes of this Act: Provided always that it shall be lawful for such assignee or assignees to apply for and obtain a sequestration of the profits of any such benefice, for the payment of the debts of such prisoner; and the order for appointing an assignee or assignees of such prisoner, in pursuance of this Act, shall be a sufficient warrant for the granting of such sequestration, without any writ or other proceedings to authorize the same; and such sequestration shall accordingly be issued, as the same might have been issued upon any writ of *levari facias* founded upon any judgment against such prisoner."

See the corresponding provision in the new Bankruptcy and Insolvent Act, 24 & 25 Vict. c. 134, s. 135.

(b) The points marked for argument on the part of the defendant, were as follows:—"That the plea avers a final order for protection and distribution made, and that the subsequent pleadings do not show that no such final order has been made."

Vict. c. 96, for the discharge of the insolvent (the defendant), and for the protection of his person from process, which strictly complies with all the requisitions of that statute. It has been solemnly decided by the Court of Exchequer in *Platel v. Beville*, 2 *Exch. 508,† that a plea like this is a good plea in bar: and that decision is in my judgment entirely consistent with the statute. The 10th section of the 5 & 6 Vict. c. 116 expressly enacts, that, if any suit or action is brought against any petitioner for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said suit or action that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized, whereof the production of the order signed by the commissioner, with proof of the handwriting, shall be sufficient evidence." The subsequent statute, 7 & 8 Vict. c. 96, s. 22, says that the final order shall be an order for the protection of the person of the petitioner from all process in respect of the several debts and sums of money due or claimed to be due at the time of filing the petition: and the Court of Exchequer decided it to be a bar to any action in respect of any debt as to which the petitioner was discharged by the Act. The second is an amending statute, and is declared by s. 74 not to alter the provisions of the former Act except so far as is therein expressly provided, or its provisions inconsistent with those of the former Act. Then, is a final order for protection, with a direction that the petitioner's proposal for the payment of his debts be carried into effect in a given manner, equally a bar with a final order for protection and distribution? The main argument which has been urged by Mr. *Hughes*, is, that the former ought not to be a bar, because there might be after-acquired property which might be made available for the liquidation of the debts of the petitioner,—the party, for instance, might obtain his discharge upon a proposal to pay 80*l.* a year towards the liquidation of his debts, and he might the next day *609] come into property worth 8000*l.* a year. I do not *affect to interfere with the exercise of discretion by the County Court Judge: but, as I read the 9th section of the 5 & 6 Vict. c. 116, there is express power to deal with after-acquired property for the benefit of the creditors, if the County Court Judge or the Commissioner shall think fit to make an order. It enacts in general terms "that the assignees shall be entitled to claim and demand from the petitioner at any time after the final order any estate and effects acquired by him after such final order shall have been made, and all such estate and effects shall be vested in such assignees, &c., and they shall hold the same in like manner as they held the estate and effects of the petitioner transferred by force of the final order: provided that no assignee, &c., shall be authorized to take possession of any such after-acquired estate and effects, &c., except under an order of a Commissioner, or of the Court of review in bankruptcy," &c. It seems to me that that is a totally distinct provision from s. 12, which enacts "that it shall be lawful for any creditor or official assignee or other assignee, at any time after the final order shall have been made, to give one month's notice to the petitioner, either by personal service, or, if he cannot be found, by service at the place of his residence mentioned in his notice of petition, that such creditor intends to apply by motion

to the said Commissioner, or, in case of his death, resignation, or removal, to the Commissioner appointed to succeed him, that the final order be rescinded as far as relates to the protection of the petitioner's person from process, and as far as relates to the effect of such order in bar of suits and actions; and the said Commissioner shall, upon hearing the matter of such motion, and any evidence in support of it, and what the petitioner has to allege against it, and any evidence against it, and, upon examining the petitioner, if he shall desire to be examined, or if the *Commissioner shall think fit, proceed to make such rescinding order as is hereinbefore mentioned, if he [*610 sees reason to believe that the petitioner had not before the making of the order sought to be rescinded made a full disclosure of his estate, effects, and debts, or had since the making of such order not given notice to the assignees of any property after acquired by him." That enables the Commissioner or Judge to vary the final order, where there has been any concealment on the part of the petitioner: and it is entirely distinct from the power given by s. 9 as to after-acquired property, which does not authorize the Commissioner or Judge to vary the final order, but enables him to make a subsequent order to enable the assignees to possess themselves of the after-acquired property. It seems to me that there is no hardship in this: and I think the decision of the Court of Exchequer in *Platel v. Bevill* fully applies to the case before us.

WILLIAMS, J.—I am of the same opinion. As to the first point, I agree that we are bound by the decision of the Court of Exchequer in *Platel v. Bevill*, that a good plea in bar is given by the 10th section of the 5 & 6 Vict. c. 116. The second point is this, that, assuming that there is sufficient foundation for a plea in bar if the case is within that section, the defendant cannot bring himself within it because this is not a final order for protection and distribution, but for protection only. This point was argued on two assumptions, viz., that, where there is an order for carrying into effect a proposal of the insolvent, the consequence of adding that is, that there is no present cession, and no power to seize after-acquired property. I think that neither of these assumptions is warranted by the language of the Act. It must be observed that the form of the final order given in the 7 & 8 Vict. c. 96 *does not say anything about distribution. There [*611 is nothing in the Act to warrant the notion that that part of the order which relates to the proposal of the petitioner is to paralyze the other provision. The 4th section of the 5 & 6 Vict. c. 116 enacts that the order "shall be called a final order, and shall be for the vesting of his estate and effects in the assignees, or for the carrying into effect such proposal as the petitioner shall have set forth in his petition." With respect to future property, no doubt, if a special proposal has been made by the petitioner, and has been fairly carried out, that will very much guide the Commissioner in the exercise of his discretion under s. 9. For these reasons, it seems to me that the order in question is a final order within the 10th section of the 5 & 6 Vict. c. 116, and a bar to this action.

WILLES, J.—I am of the same opinion. It is quite unnecessary to compare the language of the two statutes, after the very elaborate judgment of Baron Rolfe in *Platel v. Bevill*. It is clear, that, under

the 7 & 8 Vict. c. 96, the final order constitutes an absolute bar to the actions in respect of which it is a protection. Having decided to follow that case,—which I do as much from opinion as because it is the decision of a Court of co-ordinate jurisdiction,—it is unnecessary to say more. The 10th section of the 5 & 6 Vict. c. 116 enacts, that, “if any suit or action is brought against any petitioner for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said suit or action, that such petition was duly presented, and a final order for *protection and distribution* made by a Commissioner duly authorized.” That is now changed, the 22d section of the 7 & 8 Vict. c. 96 enacting that “the *612] final order to be made under the provisions of the *5 & 6 Vict. c. 116, as amended by this Act, shall protect the person of the petitioner from being taken or detained under any process whatever” in the cases thereafter mentioned; “and such final order shall be in the form specified in Schedule A. No. 3.” The form there given is “to protect the person of the petitioner from being taken or detained under any process whatever in respect of the several debts and sums of money due or claimed to be due at the time of filing his petition from the said petitioner to the several persons named in his schedule as creditors or as claiming to be creditors for the same respectively,” &c., and then it proceeds,—“And it is hereby directed that the proposal of the said petitioner set forth in his petition, for the payment of his debts, be carried into effect in the following manner, that is to say,” &c. It is only necessary to refer to s. 4 of the 5 & 6 Vict. c. 116, to see what order the Commissioner is authorized to make: it is thus described,—“which order shall be called a final order, and shall be for the *protection of the person of the petitioner from all process*, and for the *vesting of his estate and effects in the assignees*, or for the *carrying into effect such proposal as the petitioner shall have set forth in his petition*.” When such an order had been made, I should have thought that sufficient. It has been strongly urged upon us, that there is a great hardship on the creditors that the insolvent should be discharged when he gives up nothing which can be made available for distribution amongst his creditors. But the same sort of hardship was as strongly insisted upon in a case of *Laurie v. Bendall*, 12 Q. B. 634 (E. C. L. R. vol. 64) not very long after the statute was passed. But Patteson, J., said: “There is nothing in the language of the Act to make it requisite in every instance that the insolvent should have property. An *613] assignment of property is no necessary part of the *proceedings because, under this Act, the estate, if there be any, vests in the assignee on the passing of the final order.” It is clear that the assignment of property is no necessary part of the proceedings. The 7th section of the 5 & 6 Vict. c. 116 vests in the assignees, from the passing of the final order, the whole estate of the petitioner, present and future, as well real as personal, without any deed or conveyance. For what purpose does it vest in them? Necessarily as trustees either for the insolvent or his creditors. It is hardly necessary to say which. The legislature provides for the case of there being present property of the petitioner, and also (by s. 9) for future property. That section enacts “that the said assignees shall be entitled to claim and demand from the said petitioner, at any time after the said final

order, any estate and effects acquired by him at any time after such order shall have been made; and all such estate and effects, of what kind soever and wheresoever situate, shall be absolutely vested in such assignees upon their filing a copy of their claim, served upon the petitioner personally, or by leaving it at the place of residence mentioned in his notice of petition, and they shall hold the same in like manner as they held the estate and effects of the petitioner transferred by force of the final order as hereinbefore provided." The legislature has provided for the case of there being property presently to pass, and also for the acquirement of future property by the assignees under s. 9. I apprehend the best way of ascertaining the meaning of the 9th section, is, to see what were the corresponding provisions of the former insolvent Acts. Turning to the 1 & 2 Vict. c. 110, we find a series of sections for dealing with future property. Thus, by s. 87, the insolvent was required before adjudication to execute a warrant of attorney to confess judgment for the amount of the *debts stated in the schedule, upon which the Court was to be at liberty to permit execution to be taken out when it should be made to appear to its satisfaction that he was of ability to pay such debts, or any part thereof, or that he was dead leaving assets for that purpose. And by s. 88, it was provided, that, where the insolvent should after his discharge become entitled to property which could not be taken in execution, the assignees might apply to the Court for relief, and the Court might order the prisoner to be remanded to custody until he transferred such property. So, by s. 89, as to stock in the public funds, &c. It seems to me that it was clearly intended in s. 9 to provide shortly for what was provided for by these and other enactments. It is said that s. 9 does not apply to an ecclesiastical benefice, which can only be got at by sequestration. That may be: there is no provision in either the 5 & 6 Vict. c. 116 or the 7 & 8 Vict. c. 96 equivalent to the 55th section of the 1 & 2 Vict. c. 110, *antè*, p. 607. All that that comes to, is, that there is a class of cases to which the 9th section does not apply. *Parry v. Jones*, 1 C. B. N. S. 339 (E. C. L. R. vol. 87), seems to be an authority for that. If a creditor obtains a judgment which is valid at the time of the final order, and upon which a writ of *sequestrari facias* has been issued, such writ, it seems, cannot be set aside. All that can be said however, is, that this is a *casus omissus* in s. 9.

KEATING, J.—I am of the same opinion. If Mr. *Hughes* could have sustained the position which he assumed, viz., that after-acquired property could not be got at under the 5 & 6 Vict. c. 116 and 7 & 8 Vict. c. 96, he would have introduced a very formidable difficulty. He founds his argument on this, that the 12th *section is confined only to two cases, viz., where the petitioner has failed at the time of his petition to make a full disclosure of his estate and effects, or where he has omitted to give notice to the assignees of any property after acquired by him; and that the Commissioner has no power to deal with after-acquired property in any other cases. But it seems to me that the 12th section applies to the state of things existing at the time the final order is obtained, and that the 9th section applies, not to the varying of the order which has been already made, but gives the Commissioner jurisdiction to deal with after-acquired pro-

perty by means of a subsequent order. Under these circumstances, I feel no difficulty whatever in holding that the final order under the 7 & 8 Vict. c. 96, is not the less pleadable in bar because it contains, besides the order for the protection of the person of the petitioner from process, the adoption of the proposal made by him on filing his petition. There must therefore be judgment for the defendant.

Judgment for the defendant.

***616] *GARRARD and Another v. GUIBILEI. Jan. 11.**

In an action against baron for goods sold to the feme,—it is not competent to the Judge to amend the record at the trial by adding the feme as a defendant, and an allegation that the goods were sold to her *dum sola*.

The 222d section of the Common Law Procedure Act, 1852, was not intended to apply to the joinder of parties, already provided for by ss. 35—39.

THIS was an action brought by the plaintiffs, silversmiths and jewelers in London, to recover the sum of 33*l.* 13*s.* 6*d.* for goods supplied by the plaintiffs to the defendant's wife, Lady Sophia Guibilei, before her marriage with the defendant.

The declaration was in the ordinary *indebitatus* form, for goods sold to the defendant. The particulars of demand endorsed on the writ were as follows:—

"1855.		
"June 22.	Repairing gold hunting-watch; new second hand	12 0
	New shaft to marble vase	5 0
28.	A set of carbuncle and diamond studs	6 15 0
"1856.		
"July 16.	A set of lapis studs	3 12 0
	A gold signet ring, with blood-stone	2 7 0
	Engraving "Lelah" on ditto	7 0
"Aug. 6.	Tongue to sapphire brooch	2 6
"Dec. 8.	New gold setting to emerald, single stone and resetting	12 0
"1857.		
"July 20.	Set of enamel studs with opals and diamonds	10 0 0
	Set of light blue enamel studs with pearl centres	4 10 0
"Aug. 8.	Set of green enamel studs with pearl centres	4 10 0
	Registering and postage	1 0
		<u>£33 13 6</u>

The defendant served a notice to admit in the action, requiring the plaintiffs to admit his certificate of marriage with Lady Sophia Guibilei, dated May 22d, 1861.

***617] ***At the trial before Keating, J., at the sittings in Middlesex after last Trinity Term, the plaintiffs proved the sale of jewellery to Lady Sophia Guibilei before her marriage, to the value of 33*l.* 13*s.* 6*d.*, and her subsequent marriage to the defendant.

The defendant's counsel objected to the non-joinder of the wife as a co-defendant, and the variance between the declaration and the evidence, and submitted that the Judge had no power to cure the defects by amendment.

The learned Judge allowed an amendment by joining the wife as a

defendant in the action, and also an amendment in the declaration by alleging goods sold to the defendant's wife before the marriage.

A verdict was taken for the plaintiffs for the amount claimed, leave being reserved to the defendant to move to enter a nonsuit, if the Court should be of opinion that the learned Judge had no power to amend.

R. E. Turner accordingly, in Michaelmas Term last, obtained a rule nisi to enter a nonsuit, on the ground that the defendant's wife was not a party to the action, and that the Judge had not the power to amend the record. He submitted that neither the 36th, 37th, nor 39th sections of the Common Law Procedure Act, 1852, applied to the non-joinder of a defendant; and that the 222d section, which was mainly relied on by the plaintiffs at the trial, had no application to a case of misjoinder or non-joinder of parties,—citing *Wickens v. Steel*, 2 C. B. N. S. 488 (E. C. L. R. vol. 89). He further submitted that this was an attempt to join the real defendant, against whom the writ was not issued, and as against whom, if she survived her husband, the remedy would survive. [WILLIAMS, J.—It is rather a case of variance. The goods were never sold to the husband.]

**Needham* now showed cause.—Assuming that the special [*618 provisions of the Common Law Procedure Act, 1852, as to misjoinder or non-joinder of parties, do not apply to a case like the present, it is submitted that the 222d section(a) gives ample power to make any amendment which may be necessary to determine the controversy between the parties. [WILLES, J.—In *Blake v. Done*, 7 Jurist, N. S. 1306, the Judge at Nisi Prius, in an action of ejectment by the mortgagee of trust-property, amended the record by adding the names of the trustees as claimants: and the Court of Exchequer held that he was justified by s. 222 in so doing.] No inconvenience or injustice could result from allowing such an amendment, seeing that the husband defends for his wife even where she is joined for conformity: and it is for the Judge at the trial, looking at the record, and at the evidence, to say what is “the real question in controversy between the parties.”—Wilkin v. Reed, 15 C. B. 192 (E. C. L. R. vol. 80). Such an amendment was within the discretion of the Judge even before the Common Law Procedure Act. Thus, in *Horton v. The Inhabitants of Stamford*, 1 C. & M. 773,† where the plaintiff, by mistake, had proceeded against the inhabitants of the *hundred* instead of the *borough* *of S., in an action for damage by rioters under [*619 the 7 & 8 G. 4, c. 31, the Court of Exchequer amended the writ and subsequent proceedings by striking out the word “hundred,” and substituting the word “borough,” the time for bringing a fresh action having expired. Bayley, B., there says: “This is an action brought in substance against the inhabitants of Stamford. The plaintiff says that he has been injured, and that they are liable to him for the damage. The Act of Parliament gives him, as he supposes, a

(a) Which enacts that “it shall be lawful for the superior Courts of common law and every Judge thereof, and any Judge sitting at Nisi Prius, at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the Court or Judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties, shall be so made.”

remedy. He has attempted to sue the proper persons, so as to raise the question whether he has a remedy under the Act of Parliament. He has, however, mistaken the name of the district or place. It appears to me that we should be doing injustice, if we were to allow him to be concluded by such a mistake. If the record were to go uncorrected to trial, justice would be defeated merely because the advisers of the plaintiff have been guilty of a slip. There are instances, even in the case of penal actions, where the Courts have allowed amendments, and have given as their reason for such amendments that the parties would be too late if the amendments were not allowed. Plaintiffs' names have been added and changed repeatedly; and, since the late Bankrupt Act, we have had several recent instances where the names of the official assignees of bankrupts have been added, to prevent a failure of justice." [WILLES, J.—The subject was very much discussed in this Court in *Taylor v. Best*, 14 C. B. 487 (E. C. L. R. vol. 78).] (a) I should have thought it mattered little whether the party sought to be added was a plaintiff or a defendant.] The terms of the 222d section are as wide as can be: and the mere fact that certain prior clauses have been specially directed to the adding or striking out of parties, does not prevent reliance being placed upon *620] that general provision,—more especially as those sections deal only with non-joinder or misjoinder of plaintiffs, the legislature perhaps intentionally leaving the non-joinder of a defendant to be dealt with under the general power conferred by s. 222. The case of *Blake v. Done* seems to embrace this case. This was an action of ejectment brought in the name of the cestui que trust only. At the trial, an application was made to amend by adding the names of the trustees as claimants. The Judge allowed it, and the Court held that he had done right. It was urged there that the 222d section did not apply to the joinder of parties. Pollock, C. B., there says: "I am not prepared to say that the earlier clause justifies the amendment: but I am quite satisfied that the 222d section is quite sufficient. Technically it amounts to this,—whatever amendments are required, either in the names of the parties or otherwise, may be made." (b) The object is, to bring the real question before the Court; and the Judge at Nisi Prius is at liberty to make the necessary alterations." Channell, B., says: "I will assume that the 35th section does not give this power: but the 222d section does not apply to any particular form of action. I think it was intended to enlarge and increase the powers previously given: it must be read along with the 35th section, which especially applies to the joinder of parties; and, if the 222d section was intended to increase and enlarge the powers of the Court in that respect, the exercise of the power in this instance being as salutary as any that can be imagined, I am justified in saying that the power exists under the Act." And Bramwell, B., says: "When we read the 222d section. *621] the intention appears to be, that whatever special power of amendment was not previously given, by inadvertence or otherwise, should be given thereby; and it may be that there is a general power of amendment by adding plaintiffs, although there is a special

(a) And see *Johnson v. Goslett*, 18 C. B. 728 (E. C. L. R. vol. 86).

(b) This is qualified by the observations of the same learned Judge in giving judgment in this case in the Court of error. Vide post.

power of adding plaintiffs, and therefore it is not inconsistent that a general power of amendment should exist. Therefore, if s. 35 does not apply, we can have recourse to s. 222, and in doing so we are not acting contrary to the sections named, for the sections may be read together."

Markby, in support of the rule.—The fair inference from the earlier sections,—which define the amendments which are to be allowed in the cases there dealt with,—is, that there is no power of amendment in a case like this: and there are manifestly good reasons why there should not be. [WILLIAMS, J.—If a defendant is added, he has had no notice of the previous proceedings. The legislature seems to have assumed that a man might not like to be made a defendant in a suit at the time of trial, and therefore did not provide for the case of adding a defendant without his consent. The question is, whether it makes any difference that the person sought to be added is the wife, who is in the power of her husband?] The very next section (s. 40) deals with the case of husband and wife. If the legislature had intended to make the wife's an exceptional case, they would have provided for it. Many attempts have been made to bring cases within s. 222, where the provisions of the earlier sections fell short: but in no case has a defendant been allowed to be added. *Horton v. The Inhabitants of Stamford*, 1 C. & M. 773,† was a mere case of misnomer. The same parties, substantially, remained on the writ as before the amendment. In *Robson v. Doyle*, 3 Ellis & B. 396, the Court expressly say that "s. 222 clearly has no application to a case of misjoinder:" and *Crompton, J.*, in the course of the argument, [*622 observes, that, "if s. 222 were thus to override the earlier sections, the conditions annexed to the amendment, in s. 37, could not be secured." In *Wickens v. Steel*, 2 C. B. N. S. 488 (E. C. L. R. vol. 89), which was also a case of misjoinder of parties, *Cockburn, C. J.*, likewise held that s. 222 has no application to joinder of parties. With regard to *Blake v. Done*, that was a case of ejectment, which stands on different grounds. [WILLIAMS, J.—Ejectment is left under the equitable jurisdiction of the Court. The 221st section enacts that "the several Courts and the Judges thereof respectively shall and may exercise over the proceedings the like jurisdiction as heretofore exercised in the action of ejectment, so as to insure a trial of the title, and of actual ouster, when necessary, only, and for all other purposes for which such jurisdiction may at present be exercised; and the provisions of all statutes not inconsistent with the provisions of this Act, and which may be applicable to the altered mode of proceeding, shall remain in force and be applied thereto." It is unnecessary, therefore, to say whether the earlier sections did or did not apply to ejectment.] It is said that no hardship could result from the course here pursued. But, the wife being joined, if her husband died, the judgment would survive as against the wife; and, if she died, as against her personal representative. [WILLIAMS, J.—The amendment gives the plaintiffs that which they never sought to obtain by their writ, viz., a judgment against the wife.]

ERLE, C. J.—This rule seeks to set aside a verdict found for the plaintiff, and to enter a nonsuit, on the ground that the amendment made at the trial was one which is not authorized by law. I am of

*623] opinion that *the rule should be made absolute. The action is brought by the plaintiffs for the price of goods alleged to have been sold and delivered to the defendant. It turned out at the trial that no goods were in point of fact sold to the defendant; but that the goods in question were sold to the defendant's wife before her intermarriage with the defendant: and therefore it was clear that the plaintiffs must be nonsuited, unless the record was amendable and amended by making the wife a party to it. The amendment was therefore applied for, and granted. Was that amendment properly made? It is admitted that the earlier sections of the Common Law Procedure Act, 1852, relating to misjoinder or nonjoinder of parties, do not confer this power: but it is said that the case falls within the 222d section, which enacts in general terms that "all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties" shall be made. It is contended by Mr. *Needham* that the amendment here made, by making the wife a party to the suit, was necessary for the purpose of determining in the existing suit the real question in controversy between the parties, and that no injustice will be done thereby. It is true that no injustice will be done if both husband and wife continue alive until the plaintiffs have obtained the fruits of their judgment. But, suppose the husband shall die, this hardship would be imposed on the wife, viz., that a judgment upon the amended record would be operative against her. That is a possible hardship to which I think she ought not to be exposed. Moreover, if this amendment be allowable under s. 222, it may be made at any time,—after trial and verdict. But, surely the legislature never could have intended to place a new defendant upon the record at the trial, to be at that late stage

*624] brought into a condition of *liability, without any notice, and without consent. In any other case than that of husband and wife, it would obviously be a most glaring injustice. There are several sections, beginning with s. 34 and ending with s. 39, which are addressed specifically to joinder of parties. It would seem as if the legislature in that part of the statute were considering what powers they should confer upon the Court or Judge as to the putting on and striking parties off the record. I think it is manifest that these sections provide for all the cases as to joinder, with the exception of the action of ejectment, which stands upon its own peculiar grounds. The section 40 contains a special provision as to the joinder of claims by husband and wife. I think there is great force in the argument which was founded upon that section. The Court of Queen's Bench in the case of *Robson v. Doyle*, 3 Ellis & B. 396 (E. C. L. R. vol. 77), and this Court in *Wickens v. Steel*, 2 C. B. N. S. 488 (E. C. L. R. vol. 80), seem to have considered that the 222d section does not apply to the adding or removing of parties from the record. And, as to the case of *Blake v. Done*, 7 Jurist, N. S. 1306, the proper answer was given to that during the argument, viz., that it was an action of ejectment, which is so far the creature of the Court that they might always mould the proceedings so as to insure the trial of the real title. As to the case of *Horton v. The Inhabitants of Stamford*, 1 C. & M. 773,† the answer was given by Mr. *Markby*: that was in truth a mere case of misnomer: the plaintiff had a claim against the district; he sued the

hundred, and the inhabitants of the borough, who were the real parties to the suit, appeared: the amendment consisted in setting right the mere mistake in the name of the district. But it is far beyond the principle on which amendments are allowed, to bring into the suit at the trial one whom the plaintiff at the time of the commencement of the action *never thought of charging. I would be [*625 extremely willing to sustain this amendment, if I could think it at all justifiable. But I cannot come to any other conclusion than that it is a case which is not within the intention of the legislature, and would form a bad precedent. The rule must be absolute, to enter a nonsuit.

WILLIAMS, J.—I am of the same opinion. If this amendment were upheld, the effect would be to turn this into an action against the wife, against whom the plaintiffs did not by their writ seek a judgment. Not to rely upon the argument, that, to say that, because the present case is not included in any of the special clauses of the Common Law Procedure Act as to joinder of parties, recourse may be had to the general section, would render the special clauses superfluous,—an argument which, nevertheless, I consider to be entitled to much weight,—it is enough to say that the 222d section was not intended to warrant an amendment which would enable a plaintiff to get a judgment which he never contemplated when he commenced his action. It would not, in truth, be making an amendment *in the action*, but giving the plaintiff a new one.

WILLES, J.—I am of the same opinion. A husband is not liable to be sued, simpliciter, for debts contracted by his wife before marriage: he is only joined for conformity. The present action, therefore, was substantially misconceived. I cannot help thinking, looking at the parties and at the pleadings, that the real contest between the parties was intended to be whether the defendant was or was not liable alone: and I own I should have entertained considerable doubt whether that was a case for the exercise of the power conferred by the latter words of the 222d section of the *Common Law Pro- [*626 cedure Act. But I think, for other reasons, this rule ought to be made absolute. I can quite understand the propriety of amending by adding a trustee, in ejectment, because there the real question is, whether the person who sues has a right to the possession of the land, and it is immaterial to the defendant whether the legal right is in him or in another as trustee for him; and the 221st section retains the power which the Court always had of dealing equitably with the proceedings in ejectment, by adding a demise, and so on. Another serious objection to this amendment exists. The Court has only jurisdiction by reason of the writ, and that must be against the person who is to be brought before the Court by the process. The Common Law Procedure Act, 1852, did not mean to interfere with that general principle. The 38th section deals with the case of one debtor pleading the non-joinder of one who ought to have been joined as a co-defendant; and there power is given to the plaintiff, without any order, to amend the writ and declaration by adding the name of the person named in the plea as a co-contractor, serving the amended writ upon the person so named, and proceeding against him as if the date of the amendment was the date of the commencement of the action,—the party so

joined being of course at liberty to plead to the action. The 35th section, which authorizes the addition of a plaintiff, requires the consent of the party, either in person or by writing under his hand, to his being so joined. There is good reason why a similar provision is not made in the case of a defendant; for, there is little probability of a party consenting to be put upon the record as a defendant. It would be contrary to principle, however, to make a man a defendant against his will and without serving him with any process. The *627] adding of a plaintiff is not so onerous a thing as the adding a *defendant; yet there the legislature have taken care that no undue advantage shall be obtained and no injustice done. It is a golden rule of law that no person shall be injuriously affected by the act of another, unless he has ratified or assented to it. We are here called upon to say that this lady shall be put in a situation in which she may suffer detriment, but can gain nothing, and that without her consent, and without any express provision of the legislature to warrant it. If the legislature had meant that this should be done, they would undoubtedly have said so in plain terms, and would not have left it to loose and uncertain inference and conjecture. Then, can it make any difference that here the party sought to be added is the wife of the defendant? I am of opinion that it cannot. I am clearly of opinion that the amendment was wrong. I am, however, glad it was made at the time, inasmuch as it was very desirable that the matter should be put in a train to prevent further litigation. The result is that a nonsuit must be entered.

KEATING, J.—I entirely agree with the rest of the Court in thinking that this amendment was improperly made. The earlier sections do not warrant it: and s. 222 clearly was not intended to provide for an amendment by adding a party, whether plaintiff or defendant. The only possible doubt that could be suggested arises from the peculiar relation of these parties as husband and wife. But, for the reasons already given, I am satisfied that the 222d section does not give the Court power to add the name of the wife.

Rule absolute accordingly.(a)

(a) Affirmed in the Exchequer Chamber, Hilary Vacation, 1862. Vide post.

*628]

*DAVEY v. PEMBERTON. Jan. 23.

In an action for an alleged libel, the Court allowed the defendant to inspect and take fac-simile copies, "by photograph or otherwise," of the documents referred to in the declaration.

THIS was an action for a series of libels on the plaintiff, contained in certain letters alleged to have been written by the defendant.

Bovill, Q. C., on a former day in this term, on the part of the defendant,—upon an affidavit by him positively and unequivocally denying that he was the author of the alleged libels,—obtained a rule calling upon the plaintiff to show cause why the defendant, his attorney and witnesses, should not respectively be at liberty to inspect and take fac-simile copies, by photograph or otherwise, of the several letters and envelopes referred to in the declaration. He submitted

that the whole importance of the documents depended upon the precise form of them, and that copies in the ordinary way would be useless. He stated that photographs had been taken in *Hughes v. Lady Dinorben*, and that the case could not have been satisfactorily tried without them.

Honyman now showed cause.—He submitted, that, if the Court allowed the defendant to take copies as prayed by this rule, they would at all events do as *Crompton, J.*, did in the case referred to, viz., impose upon the defendant as a condition that he should furnish the plaintiff with a list of the persons he intended to bring to inspect the documents,—which he stated to be a reasonable and a well-known and recognised condition,—for that otherwise the defendant might bring twenty persons to inspect the documents, and only call one of them at the trial; or, if photographs were taken, might show them to any number of persons, and so altogether evade the rule.

**Bovill, Q. C.*, and *Garth*, in support of the rule.—The only [*629 object of the defendant is, to obtain accurate copies of the alleged libels. The defendant will gain no undue advantage from it, nor will the plaintiff sustain any prejudice.

ERLE, C. J.—It seems to me, that, by granting this application, we shall be furthering the interests of truth and justice: and I cannot see any possible prejudice that can arise to the plaintiff.

WILLES, J.—I am of the same opinion. I must say I am totally unaware of the existence of any such rule as that suggested by Mr. *Honyman*. It is not usual to call upon a party to give notice of the witnesses he intends to call. The only excepted case that I am aware of is that of high treason. It may, for aught I know, be fraught with great disadvantage to the administration of justice to introduce such a practice.

WILLIAMS, J., and *KEATING, J.*, concurred.

Honyman asked for costs.

ERLE, C. J.—It is my invariable practice to make the party seeking the inspection to bear the costs of it.

WILLES, J.—The costs of the rule will be costs in the cause.

ERLE, C. J.—And the costs of the inspection plaintiff's costs in any event.

The rule was drawn up as follows,—“That the defendant, his attorney and witnesses respectively, be at liberty to inspect and take **fac-simile* copies by photograph [*630 or otherwise of the several letters and envelopes referred to in the declaration; that the costs of and occasioned by this application to the Court do abide the event of this cause; and that the plaintiff's costs of and occasioned by the said inspection and copies be his costs in the cause in any event.”

Re ARABELLA WOODMAN. Jan. 16.

The Court refused to allow a certificate of acknowledgment taken in Ontario, under the 3 & 4 W. 4, c. 74, to be filed, where the affidavit of verification purported to be sworn before "J. S., an attorney of the Supreme Court." The affidavit must be sworn before a magistrate, and his authority to administer oaths certified by a notary public.

PRENTICE moved that the proper officer under the 3 & 4 W. 4, c. 74, might be directed to receive and file the certificate of an acknowledgment taken under a special commission at a village in the county of Ontario called Oshawa. The affidavit of verification was sworn before one John Smith, who described himself as an attorney of the Supreme Court. There was no notarial certificate, nor any affidavit of circumstances to excuse the absence of it. But there was an affidavit that Mr. Smith was a person duly qualified to take affidavits in the district. It was submitted, that, inasmuch as the requiring the affidavit to be sworn before a magistrate was a mere rule of practice, it was competent to the Court to dispense with its observance. In *re Daly*, 5 C. B. 128, was referred to, where, in the case of an acknowledgment taken in a remote part of India, the Court, in lieu of a notarial certificate, received the certificate of the Major-General in command of the district, upon production of an affidavit stating his rank and verifying his handwriting.

*631] ERLE, C. J.—In a recent case of *In re Anne Smith*, *10 C. B. N. S. 344 (E. C. L. R. vol. 100), we held a similar objection to be fatal. There, the affidavit verifying the taking of an acknowledgment at Wellington, in New Zealand, purported to be sworn before "John King, a solicitor of the Supreme Court of Wellington, and a Commissioner for taking affidavits there," and we felt bound to reject it. The practice requires the affidavit to be sworn before a magistrate, and fortified by a notarial certificate.

The rest of the Court concurring,

Prentice took nothing.

EICKE v. JONES. Jan. 24.

To a declaration for the price of certain volunteers' uniforms, the defendant pleaded that the contract was corruptly entered into (in violation of the 49 G. 3, c. 126), with intent that the defendant might have a certain military commission:—Held, that the plea disclosed no illegality within the statute.

THE first count of the declaration stated that theretofore, to wit, on the 29th of September, 1860, in consideration that the plaintiff, at the request of the defendant, would clothe twenty volunteers of the southern division of the 40th Middlesex rifle volunteers with uniforms, the defendant promised to pay for the said uniforms at the rate of 3*l.* 15*s.* per man, within three months from the day and year aforesaid: Averment, that the plaintiff did within a reasonable time after the said promise clothe twenty volunteers of the southern division of the 40th Middlesex rifle volunteers with uniforms, and did all things necessary on his part to entitle him to be paid for the same by the defendant at the rate aforesaid, and that the time for the defendant to

pay for the said uniforms had elapsed; yet the defendant had not paid for the same, and the *price of the said uniforms still remained [*632 wholly due and unpaid to the plaintiff.

There was also a count for money payable by the defendant to the plaintiff for work and materials, for goods sold and delivered, and for money due upon accounts stated.

Sixth plea,—that the defendant made the promise in the first count mentioned, and the agreements by which the debts in the second count mentioned were contracted, to the intent hereafter mentioned, and the plaintiff corruptly, and against the form of the statute (49 G. 3, c. 126) in such case made and provided, took the said contract and made the said agreements to the intent that the defendant might have a certain military commission.

To this plea the plaintiff demurred, the ground of demurrer stated in the plea being, “that it is not illegal to supply the defendant with volunteers’ uniforms, with intent that he might obtain a commission.” Joinder.

R. Clarke, in support of the demurrer, was stopped by the court.(a)

Bristow, contra.(b)—The plea is good and an answer *to the declaration. The contract is void by the 5 & 6 E. 6, c. 16, [*633 and 49 G. 3, c. 126. It must be taken upon this record, that the plaintiff entered into the agreement stated in the plea for the corrupt purpose therein mentioned.

ERLE, C. J.—I can discover no corruption here to bring the case within the statute. To constitute the offence, the contract must be connected directly or indirectly with the person capable of furthering the application for the office.

The rest of the Court concurring, Judgment for the plaintiff.

(a) The points marked for argument on the part of the plaintiff were:—

“1. That it is not illegal for the plaintiff to supply the defendant with volunteers’ uniforms with the intent that the defendant might obtain a commission:

“2. That the statute 49 G. 3, c. 126, referred to in the sixth plea, is inapplicable:

“3. That, it being conceded that the military commission referred to in the sixth plea was a commission in a volunteer corps, such a commission is not within the words of the Act or the mischief sought to be thereby corrected.”

(b) The points marked for argument on the part of the defendant were as follows:—

“That the plea alleges a contract illegal according to the statute referred to, and brings the case within the statute: That, for the purposes of the argument, it is not conceded that the commission was to be in a volunteer corps: That, if it were so conceded, the Court would be at a loss how to deal with the question, as the constitution of the supposed volunteer corps is not stated on the record: That, if the plaintiff contends that some volunteer corps was meant, and that a commission in that corps is not a military commission within the meaning of the statute, he should have taken issue, and not demurred: and that, even if the Court could see that a volunteer corps not within the statute was meant, they might and ought to hold the contract void as contrary to public policy, and treat the statute as evidence of the requirements of public policy, and to a great extent as merely declaratory of the common law; but no such question is open to the Court on this record.”

*HOWLETT v. TARTE. Jan. 34. [*634

The discretion of the Court or a Judge as to allowing or withholding costs, under the 15 & 16 Vict. c. 54, s. 4, is to be exercised with reference to the propriety of bringing the action in the Superior Court at the time it is brought, and not with reference to the complications which may be introduced by the acuteness of the special pleader.

THIS was an action brought to recover the sum of 11*l.* 5*s.* for a year and a half's rent of a piece of land at Putney, in the county of Surrey, under an agreement dated the 29th of September, 1853, whereby, amongst other things, the defendant agreed to pay the plaintiff annually the sum of 7*l.* 10*s.*, and the plaintiff agreed to grant him a lease of the said piece of land as soon as he should have erected thereon a certain messuage, as described in the said agreement.

The declaration contained two counts, the first founded upon the agreement, the second for use and occupation. The defendant pleaded, —first, never indebted,—secondly, that his tenancy had before the plaintiff's cause of action accrued resolved itself into a tenancy from year to year, and had then been put an end to by the defendant by a notice to quit. To the second plea the plaintiff replied specially an estoppel by reason of the defendant having omitted to raise that defence in a former action upon the same agreement. The defendant demurred to that replication, and upon the argument of the demurrer obtained judgment,—10 C. B. N. S. 813 (E. C. L. R. vol. 100).

The issue of fact was tried before the secondary of London on the 12th of July last, when it was submitted on the part of the defendant that the agreement was void under the 8 & 9 Vict. c. 106, s. 3, as professing to create a demise and not being a deed. The secondary, inclining to this view, directed the jury accordingly, and they found for the defendant on the first issue,—leave being reserved to the plaintiff to move to enter a verdict for him for 11*l.* 5*s.*, if the Court *635] should be of opinion that the deed was not void under the statute. A rule nisi was accordingly obtained in Michaelmas Term last, which was afterwards made absolute, to enter a verdict for the plaintiff on the first issue as to the first count for 11*l.* 5*s.*, and for the defendant on the same issue as to the second count.

Dowdeswell, for the plaintiff, now moved for a rule to authorize the master to tax the plaintiff's costs, under the 15 & 16 Vict. c. 54, s. 4.(a) He submitted that the action and the defence were of such a nature as to justify the plaintiff in suing in the Superior Court for the purpose of establishing the validity of the agreement. [WILLES, J.—The question in issue involved a great deal more than the amount of the rent in question.]

T. J. Clark showed cause in the first instance.—The question to be tried was a mere question of fact,—whether or not a new agreement had been substituted for the old one. At the date of the issuing of the writ, the matter in dispute was perfectly simple. The defendant is not to be mulcted in the costs of a trial in the superior Court because the plaintiff has thought fit, by putting a very ingenious replication upon the record, to introduce an unnecessary complication into the cause.(b)

ERLE, C. J.—I quite agree with Mr. *Clark*, that our discretion as to the allowing or withholding costs is to be exercised with reference to the consideration whether at the time of the commencement of the

(a) The application had already been made to Byles, J., at Chambers; but he referred the matter to the Court.

(b) See *Dunston v. Paterson*, 2 C. B. N. S. 459 (E. C. L. R. vol. 89); 5 C. B. N. S. 267, 273 (E. C. L. R. vol. 94).

action it was *one that was fit to be brought in the superior Court. The question here was certainly one of great importance to the plaintiff, viz., whether the defendant was to get rid of the liability under a building agreement which was to endure for ninety years. I do not know any case which would require more knowledge of the law to determine rightly than the question raised here. It seems to me that the case was one which was eminently fit for the judgment of a superior Court.

The rest of the Court concurred.

Clark.—As he was sent to the Court by the learned Judge, the defendant ought not to be charged with the costs of this rule.

ERLE, C. J.—The ordinary rule is that the costs of such a motion should be costs in the cause; and I see nothing to make this case an exception.

Rule accordingly.

*HENRY CASWELL, Appellant; SAMUEL COOK, Respondent. *Jan. 27.* [*637]

The 13th section of the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), enacts that "after the market place is open for public use, every person other than a licensed hawk who shall sell or expose for sale in any place within the prescribed limits except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorized to be taken in the market," shall forfeit 40s.

The 38th section of the Wolverhampton Improvement Act, 1853 (16 & 17 Vict. c. xxviii.), enacts that "the local board and their lessees may from time to time demand and take from any person occupying or using any shop, stall, stand, bench, or ground space in any market-place for the time being under the management of the local board, and used as a general market, such tolls as the local board or their lessees from time to time appoint, not exceeding the several tolls specified in the schedule A. to the Act annexed:" and the schedule in terms imposed the "toll" on the occupier of "every shop, stall, or ground space" in the market, and not upon the commodities sold or exposed for sale there:—

Held, that a person who sold fruit and fish (which are marketable articles) from door to door within the prescribed limits, did not thereby become liable to the penalty imposed by the 13th section of the general Act:

And that the "prescribed limits" meant the limits to which the local Act applied, viz. the boundaries of the borough.

THE following case was stated for the opinion of this Court, pursuant to the 20 & 21 Vict. c. 43:—

At a petty sessions of the peace holden in and for the borough of Wolverhampton, on the 20th of August, 1861, before us, the undersigned, two of her Majesty's justices of the peace in and for the said borough, Samuel Cook (the above-named respondent) was charged on two informations laid by Henry Caswell (the above-named appellant), as the lessee of the markets and market-hall in the said borough, the first of which was in substance as follows:—That, on the 31st of July, 1861, at the said borough, after the market-place was opened for public use in the said borough, he the said Samuel Cook (not being a licensed hawk) did sell or expose for sale in a street in the said borough, and not in his own dwelling-place or shop, certain articles, to wit, fruit and shrimps, in respect of which tolls are authorized to be taken in the said market, contrary to the statute in such case made and provided. And the second information was, that, on the 1st of August, 1861, at the said borough, after the market-place was open

for public use in the said borough, he the said Samuel Cook (not being a licensed hawkers) did sell or expose for sale in *Pountney Street, in the said borough, and not in his own dwelling-place or shop, certain articles, to wit, herrings, in respect of which tolls are authorized to be taken in the said market, contrary to the statute in such case made and provided.

The complainant relied upon the provisions of the following statutes,—“The Wolverhampton Improvement Act, 1853 (16 & 17 Vict. c. xxviii.),” and Schedule A. referred to in the Act.

Section 3 enacts that this Act shall for all purposes be in force and have effect within the municipal borough of Wolverhampton. Section 5, that the local board shall mean, the mayor, aldermen, and burgesses of the borough of Wolverhampton, in their capacity of the local board of health for the borough. Section 28, that the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), shall be incorporated with this Act. And section 29, that, whereas the local board were then in the possession of the new market-house under an agreement with the proprietors thereof, the said new market-house, with the franchises, rights, members, and appurtenances thereof, should be, after the execution of the deed thereafter referred to (which deed has since been duly executed, as admitted by both parties to this case, transferred to and vested in the local board of health. Section 38, that, from and after the commencement of this Act, the local board and their lessees may from time to time demand and take from any person occupying or using any shop, stall, bench, or ground-space in any market-place for the time being under the management of the local board and used as a general market, such *tolls* as the local board or their lessees from time to time appoint, not exceeding the several tolls specified in Schedule A. to this Act. The 50th section authorizes the local board to demise and let the market and market-places.

*639] The “General Market” consists of the market-hall, where articles are sold by retail, and of the wholesale market held during certain hours on Wednesdays and Saturdays, in streets immediately adjoining the market-hall.

The schedule A referred to in the foregoing Act is headed “General Market Tolls.” From the occupier of every stall raised above the ground for the sale of vegetables, *fruit*, *fish*, game, poultry, china, glass, earthenware, baskets, hardware, or other commodities, articles, or things, according to the size or dimensions of such stall, namely, for each lineal foot of frontage thereof,—

If let by the year, a yearly sum not exceeding 1*l*. 15*s*.

If let by the week, any weekly sum not exceeding 9*d*.

If otherwise taken, for every market-day or other day, any daily sum not exceeding 4½*d*.

Stands or Benches.

From the occupier of every stand or bench, according to the size or dimensions of the same, namely, for each superficial square foot or fractional part of a superficial square foot thereof,—

If taken by the year, any yearly sum not exceeding 5*s*.

By the week, any weekly sum not exceeding 6*d*.

If otherwise taken, for each market-day or other day in the week, any daily sum not exceeding 2*d*.

Ground Space.

From the occupier of each compartment or space on the surface of the ground, according to the size and dimensions of the same, namely, for each superficial square foot thereof,—

If taken by the year, any yearly sum not exceeding 8s.

By the week, any weekly sum not exceeding 3d.

*If otherwise taken, for each market-day or other day in the [*640 week, any daily sum not exceeding 1d.

The appellant produced the appointed table of tolls dated 25th July, 1860, a copy of which accompanied and was to be read as part of the case.

He also relied upon the Markets and Fairs Clauses Act, 1847, s. 13, which enacts, "That, after the market-place is opened for public use, every person other than a licensed hawker who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorized to be taken in the market, shall for every such offence be liable to a penalty not exceeding 40s."

The facts as laid in the respective informations were to the following extent admitted by the respondent, viz., that on the 31st of July, and the 1st of August, 1861, at the borough of Wolverhampton, after the market-place was opened for public use, he, not being a licensed hawker, did sell or expose for sale in Pountney Street, within the prescribed limits of the Wolverhampton Improvement Act, 1853, and not in his own dwelling-place or shop, certain articles, to wit, fruit, shrimps, and herrings. It was also admitted by him that the 12th section of the Markets and Fairs Clauses Act, 1847, had been complied with; that tolls had been appointed and published in accordance with the 38th section of the Wolverhampton Improvement Act, 1853; that the appellant was the lessee of the market-place and tolls under the local board; and that he had issued notice to the public, notifying that every person selling goods on which toll was payable, except in his own dwelling-house or shop, would be liable to a penalty of 40s., which the respondent admitted he had seen.

Upon the above state of facts, it was contended by the appellant that the respondent had incurred two *penalties of 40s. each, [*641 for selling in the street articles, to wit, fruit and fish, in respect of which toll is authorized to be taken in the market; and, although parties pay toll in the form of an occupation payment for a stall, stand, bench, or so many superficial square feet of land, that this ought to be looked upon as a toll upon the articles sold; and that, as a matter of convenience and simplicity, it is the best and fairest mode of assessing such toll. In support of his view of the case, he quoted *The Llandaff and Canton District Market Company, app., Lyndon, resp.*, 8 C. B. N. S. 515 (E. C. L. R. vol. 98). He further contended that all fruit and fish sold or exposed for sale within the borough was liable to toll, unless the same was sold in the seller's dwelling-place or shop, and that the respondent might easily have avoided any penalty by selling his commodities in the market, where there is sufficient space unoccupied, and not in the street: and one of the appellant's witnesses stated that the respondent might also have avoided a penalty

by first going to the market lessee and paying a small toll before going from house to house, or selling in the street.

On the part of the respondent, it was alleged, that, from time immemorial, the inhabitants of Wolverhampton had been used to sell and deliver from house to house vegetables, fruit, and fish, to persons residing within the limits of the borough, although prior to the Wolverhampton Improvement Act, 1853, there had been a weekly market held under a charter granted by King Henry the 3d, at which payments were demanded and taken from parties for stallages in the market-place when using or selling at such stalls fruit, fish, or vegetables, but no toll had ever been imposed in respect of each article sold; that the appellant was now attempting to create a monopoly, and compel all parties to come to his market, whether it suited their *642] convenience or not; and that a great hardship would be inflicted upon the poorer classes, who he conceived had a right to buy or sell articles of food without going to the appellant's market.

The respondent also contended that not one single article which had been sold or offered for sale by him was subject to a toll under the schedule or list of tolls, as the clause did not impose tolls upon either fruit, fish, or vegetables, but was simply a stallage or rental for the use of any stall, bench, or land occupied by parties resorting to the market: and he quoted the 38th, 46th, 47th, and 48th sections of The Wolverhampton Improvement Act, 1853, as carrying out the intention that there should be a stallage payment, and not a payment upon any particular article.

The case being one of great importance so far as respects the rights and freedom of traders and the public on the one part, and the rights and privileges of the local board and the market lessee on the other part, we gave the same a full and careful consideration, and adjudicated against the appellant on the following grounds,—

First. We find, and it was proved before us, that, from time immemorial, prior to the Wolverhampton Improvement Act, 1853, parties had been in the constant habit of selling fruit, vegetables, and fish in the streets within the limits of the said Act, without being interfered with by the owners of the market-tolls; but, whether they had a legal right so to act or not, we had no evidence before us, and we cannot determine:

Secondly. We find, on reference to the Hawkers' Act, 50 G. 3, c. 41, s. 23, that persons selling fruit and fish are exempted from taking out a hawker's license; and therefore it was unnecessary for the respondent to take out such license on the supposition that it might *643] bring him within the exemption mentioned in the 13th section of The Markets and Fairs Clauses Act, 1847:

Thirdly. We were of opinion that toll and stallages are different things; and that, unless a person occupies a shop, stall, bench, compartment, or space of ground in the appellant's market, he is not liable to pay any toll:

Fourthly. We do not find there is any fixed sum for a basket, parcel, or quantity of fruit, fish, or vegetables, named in the schedule to the Wolverhampton Improvement Act, 1853, or the appointed printed table of tolls produced to us, which we find is different from tables in other markets established under the provisions of The

Markets and Fairs Clauses Act, 1847, as they generally name a toll upon each basket, parcel, or quantity, or exempt fruit and fish from toll:

Fifthly. We do not find that there is any clause in the Wolverhampton Improvement Act, to prohibit parties from crying or exposing fish or fruit for sale, or from selling the same from door to door within the limits of the Act, without first going to the market and paying a toll or stallage thereon; or, supposing a trader should require a stall, bench, or space of ground, he can insist upon the local board or lessee of the market finding him this accommodation.

Whereupon the complainant (the appellant in this case) being dissatisfied with our decision, he has, pursuant to the provisions of the statute in that behalf, given us notice that our determination is erroneous in point of law, and required us to state a case setting forth the facts and the grounds of our determination for the opinion of this Court; and he has also entered into a recognisance within the prescribed time and on the usual terms, before us, conditioned to prosecute his appeal.

And hereupon the judgment of the Court of *Common Pleas [*644 is respectfully required whether we the said justices were correct in point of law in our adjudication as aforesaid, and what shall be done in the premises.

Welshy, for the appellant.(a)—Two questions substantially are reserved for the opinion of the Court,—first, whether, as the articles sold by the respondent did not require the seller to possess a hawker's license, he was exempted from the operation of the Markets and Fairs Clauses Act, 1847,—secondly, what is the meaning of the word "toll" in the local Act.

1. The 13th section of the general Act is express: "After the market-place is opened for public use, every person *other than a licensed hawker* who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorized to be taken in the market, shall for every such offence be liable to a penalty not *exceeding 40s." The respondent is a person [*645 "other than a licensed hawker." It is true that the articles he sold,—fruit and fish,—are such as do not require a hawker's license: but still the party comes within the very words of the section.

2. Then, what is meant by the word "toll." Is it to be confined to toll strictissimi juris, or does it extend to "toll" in the larger sense in which the word is constantly used in these Acts of Parliament? The whole purview of the Act shows that the word is used in its largest

(a) The points marked for argument on the part of the appellant were as follows:—

"1. That the 'general market-tolls' which by schedule A. annexed to 'The Wolverhampton Improvement Act, 1853,' and by the table of tolls framed under that Act are authorized to be taken, are 'tolls' within the meaning of the 13th section of the 'Markets and Fairs Clauses Act, 1847,' 10 & 11 Vict. c. 14:

"2. That therefore the respondent having, on the occasions mentioned in the case, sold articles mentioned in the said schedule A., viz. fruit and fish, within the limits of the Wolverhampton Improvement Act, and not in his own dwelling-place or shop, he, not being a licensed hawker, was liable to the penalties imposed by the said 13th section of the 'Markets and Fairs Clauses Act, 1847; and that it is no answer to the information, that a license is not required by law for the hawking of fruit or fish:

"3. That the first finding of the magistrates is immaterial."

and most comprehensive sense. Thus, the 38th section enacts, that "from and after the commencement of this Act, the local board and their lessees may from time to time demand and take from any person occupying or using any shop, stall, stand, bench, or ground-space in any market-place for the time being under the management of the local board and used as a general market, such tolls as the local board or their lessees from time to time appoint, not exceeding the several tolls specified in schedule A. to the Act annexed." So, s. 39 speaks of "tolls" for every wagon or cart brought into the market-place, or for pitching any commodities in the market,—s. 40, for cattle or live stock,—s. 41, for any wagon or cart brought into the hay and straw market,—s. 42, for weighing and measuring commodities brought to the market-place,—s. 43, for the use of the machines for weighing carts,—s. 45, for slaughtering cattle in any slaughter-house belonging to the board,—s. 46, for the occupation of any shop, stall, bench, compartment, or space of ground. And s. 47 enacts that "the several tolls respectively may be demanded and taken by the officers of the local board and of their lessees respectively." The 13th section of the general Act must apply to all these sums, which are called "tolls" *646] in the local Act, as they are called in common parlance *throughout the kingdom. And this is evidently consonant to the intention of the local Act, the object of which was to compel parties to come into the market-place and so free the streets of the town from obstruction. The case of *The Llandaff and Canton District Market Company, app., Lyndon, resp.*, 8 C. B. N. S. 515 (E. C. L. R. vol. 98), has no bearing upon the present. The question there was, what was a dwelling-house or a sale therein. The question here depends entirely upon the construction of the local Act and the 13th section of the general Act incorporated therewith. [ERLE, C. J.—Where is the definition of "the prescribed limits?"] In the 3d section of the local Act, which enacts "that this Act shall for all purposes be in force and have effect within the municipal borough of Wolverhampton."

Ryder, for the respondent.(a)—The main question is, whether the *647] local board or their lessees are entitled to "a toll" on fruit and fish sold elsewhere than in the market-place or in the dwelling-house or shop of the seller. These claims, which are in restraint of the common-law right of buying and selling, and impose a burthen upon the subject, should be construed with strictness. In *Warrington v. Furber*, 8 East 242, 245, Lord Ellenborough says: "I think that where the subject is to be charged with a duty, the cases in

(a) The points marked for argument on the part of the respondent were as follows :—

"1. That the market-tolls authorized by the Local Board of Health Act, called *The Wolverhampton Improvement Act, 1853*, are not leviable on stalls and places occupied for the sale of goods outside the general market, and within the jurisdiction of the board:

"2. That such tolls are not leviable on persons carrying or exposing for sale fruit, vegetables, and fish, in streets and places outside the general market, and within the jurisdiction of the board:

"3. That such tolls are payments for the occupation of ground space and certain superficial square feet of land, and are not tolls to be levied on the articles sold:

"4. That, from time immemorial, a custom has existed for persons to sell fruit, vegetables, and fish in the streets and places within the jurisdiction of the board, and that the said custom is still in existence, and has not been destroyed by the *Wolverhampton Improvement Act, 1853*."

which it is to attach ought to be fairly marked out; and we should give a liberal construction to words of exception, confining the operation of the duty." Again, in *Gildart v. Gladstone*, 11 East 675, 685, —where the question was as to the right of the Liverpool Dock Company to exact certain tonnage-dues,—the same learned Judge says: "If the words would fairly admit of different meanings, it would be right to adopt that which would be most favourable to the interest of the public, and most against that of the Company; because the Company in bargaining with the public ought to take care to express distinctly what payments they were to receive; and because the public ought not to be charged unless it be clear that it was so intended." In *Denn v. Manifold v. Diamond*, 4 B. & C. 243 (E. C. L. R. vol. 10), 6 D. & R. 328 (E. C. L. R. vol. 16), Bayley, J., says: "It is a well-settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language." Again, Best, C. J., in *Looker v. Halcombe*, 4 Bingh. 183 (E. C. L. R. vol. 13), 12 J. B. Moore 410 (E. C. L. R. vol. 22), says: "An Act of Parliament which abridges the liberty of the subject ought to receive the strictest construction; nothing should be holden to come under its operation that is not expressly within the letter and spirit of the Act." Tindal, C. J., uses very similar language in *Parker v. The Great Western Railway Company*, 7 Scott N. R. 835, 870, 7 M. & G. 253, 288 (E. C. L. R. vol. 49). The result of the cases upon the subject is thus summed up in *Dwarris on Statutes* 646,—"It is a *well-settled rule of law, that every charge upon the subject must be imposed by clear and unambiguous language. Acts of Parliament which impose a duty upon the public will be critically construed with reference to the particular language in which they are expressed. When there is any ambiguity found, the construction must be in favour of the public; because it is a general rule, that, where the public are to be charged with a burden, the intention of the legislature to impose that burden must be explicitly and distinctly shown." Then, as to the construction of the clauses in the local Act. The 38th section points to payments to be made in respect of space occupied within the market-place. [WILLIAMS, J.—Two questions are presented for our consideration,—what is the meaning of "the prescribed limits,"—and what is the meaning of "tolls" by the special Act authorized to be taken in the market? To entitle the appellant to succeed, he must make out that "prescribed limits" means the space comprised within the borough of Wolverhampton, and also that the word "tolls" in s. 13 of the general Act is applicable to all sums to be paid for stalls or standing in the market-place.] The 2d section of the general Act enacts that "the word 'prescribed' used in this Act in reference to any matter herein stated, shall be construed to refer to such matter as the same shall be prescribed or provided for in the special Act, and the sentence in which such word occurs shall be construed as if, instead of the word 'prescribed,' the expression 'prescribed for that purpose in the special Act' had been used." For the meaning of "prescribed limits" we must have recourse to the local Act: and the natural place to look for it there would be the clause giving the local board general power to levy tolls, viz., s. 38, and that is expressly confined to the market-place. The definition *of "tolls" is only to be found in schedule A. in the local Act; and that extends only to payments [*649

to be made in respect of shops, stalls, stands, and ground space occupied in the market: there is nothing in any of the schedules imposing a toll in the market on specific articles, as there is in the Llandaff and Canton District Markets Act, 1858, 21 & 22 Vict. c. cv.

Welsby, in reply.—The words "prescribed limits" in the 13th section of the general Act must refer to some place outside the market-house or market-place, otherwise the exception of the party's "own dwelling-place or shop," would be insensible. [ERLE, C. J.—The "prescribed limits" must be the boundaries of the borough of Wolverhampton.] Then, it is clear that somebody is to be prevented from selling except in the market-place. The prohibition in s. 13 can only be in respect of articles brought there to be sold. In *The Mayor of Macclesfield v. Pedley*, 4 B. & Ad. 397 (E. C. L. R. vol. 24), 1 Nev. & M. 708 (E. C. L. R. vol. 28), a claim by immemorial custom to exclude all persons from selling marketable commodities on the market-day, except in the market-place, was held to be valid in law. [WILLIAMS, J.—The only power given by s. 38 of the local Act is, to tax the stalls or space; there is no power to levy a toll upon the articles sold or exposed for sale. Now, to render himself liable to the penalty imposed by s. 13 of the general Act, the respondent must have sold an article which is charged with a market-toll.] An article in respect of which a toll is authorized by the local Act to be taken from the seller. [ERLE, C. J.—The person who has a stall in the market pays the same toll whether he brings anything there or not,—rent for the space.] The general Act has a series of clauses relating to toll. The 37th section, which inflicts a penalty upon "every person who *650] *shall demand or receive a greater toll than that authorized to be taken under the provisions of this or the special Act," must be applicable to every sum by the local Act authorized to be taken. [WILLIAMS, J.—In strictness market-toll is a sum of money paid by the buyer of the goods: Comyns's Digest, *Toll* (A.)] The tolls here imposed do not mean toll in that sense; all these payments are charged upon and payable by the seller. The intention of the Act of Parliament is plain, viz., to compel all persons dealing in marketable articles, otherwise than in their own shops, to come to the market.

ERLE, C. J.—I am of opinion that our judgment must be in favour of the respondent. The complaint against him is, that he (not being a licensed hawker) exposed for sale within the limits of the borough of Wolverhampton, and not in his own dwelling-place or shop, fruit and fish, in respect of which tolls are authorized to be taken in the market there: and the complaint is made under the 13th section of *The Markets and Fairs Clauses Act, 1847* (10 & 11 Vict. c. 14), which enacts, that, "after the market-place is open for public use, every person other than a licensed hawker who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorized to be taken in the market, shall for every such offence be liable to a penalty not exceeding 40s." In my judgment, the respondent is not brought within the essential part of that section. The market was open; the respondent is not a licensed hawker; and it is clear that "the prescribed limits" means the boundaries of the borough; and it is also clear that the respondent sold from house to

house, and not in his own dwelling-place or *shop. But then the article sold must be an article upon which toll is authorized by the special Act to be taken in the market. Is fish an article in respect of which a toll is authorized by the special Act to be taken? I am of opinion that it is not. The main reliance on the part of the appellant was placed on the 38th section of the local Act, which provides, "that from and after the commencement of this Act, the local board and their lessees may from time to time demand and take from any person occupying or using any shop, stall, stand, bench, or ground space in any market-place for the time being under the management of the local board, and used as a general market, such tolls as the local board or their lessees from time to time appoint, not exceeding the several tolls specified in the schedule (A) to this Act annexed." Does schedule A. authorize the levying of any toll in respect of fish? It imposes a toll or rent upon the occupier of every shop or stall for the sale of fish, &c., or of any ground space. It is clear, therefore, upon the construction of that section and of the schedule, that the toll is imposed on the space occupied in the market-place, and not upon the article brought there and sold. The occupiers are to be subject to the charge whether there is anything bought or sold there or not. Persons coming there and using the property of the local board are to pay for the accommodation. I am the more convinced that that is the meaning of the statute, because I find several sections and several schedules following s. 38, in all of which toll is similarly imposed in respect of the occupation of space in the market-place: see ss. 39, 40, 41, 42, 43, and the schedules they respectively refer to, in all of which the toll is in like manner fixed upon the occupier of the space. And this is not done improvidently or inadvertently; because a distinction is made in s. 44 and schedule G. *in the case of fairs, where the toll is imposed upon the article exposed for sale. The provisions for the show of wild beasts, &c., indicate that the fairs were contemplated to extend far beyond the limits of the market-place. It seems to me that the whole statute is by this construction rendered consistent. It will compel all persons holding stalls in the thoroughfares to go into the market-place, and at the same time protect the interests of the poorer portion of the community, who might be seriously incommoded if a great variety of perishable commodities could not be carried for sale from house to house. And I do not think this construction will seriously damage the interests of the local board or their lessees. I quite agree with the authorities relied upon by Mr. *Ryder* to show that a burthen is only to be imposed upon the subject by clear and express words.

The rest of the Court concurring,

Appeal dismissed.(a)

(a) And see *Wiltshire, app., Baker, resp., antè*, p. 237, and *Wiltshire, app., Willott, resp., antè*, p. 240.

*653] **THE GREAT WESTERN RAILWAY COMPANY, Appellants; The Town Council of MAIDENHEAD, Respondents.** Jan. 27.

By the 92d section of the Municipal Corporation Act, 5 & 6 W. 4, c. 76, the council of the borough were authorized to impose a watch-rate on all property in the borough, situate within 200 yards of any street or continuous line of houses. By the 2 & 3 Vict. c. 28, s. 1, the council are authorized, if they think fit, to cause the *whole* of the borough to be watched, and to order that the whole borough shall be assessed to a watch-rate. Such an order having been made by the council of the borough of M.:—Held, that all property within the said borough, though situate more than 200 yards from any street or continuous line of houses, was liable to be rated: and that there was nothing in the subsequent Act of 3 & 4 Vict. c. 28, to limit that liability.

THIS was a case stated for the opinion of the Court, under the 20 & 21 Vict. c. 43, by James Daniel Morling Pearce, one of Her Majesty's justices of the peace for the borough of Maidenhead, in the county of Berks, acting in and for the said borough:—

On the 1st of February, 1858, the Great Western Railway Company, by Mr. *H. Edmunds*, appeared before the above-named justice and William Lock, Esq., another justice of the said borough (since deceased), to answer the complaint of Ephraim Davey, Town Clerk of the said borough, for non-payment of a watch-rate made for the said borough on the 28th of November, 1856, and which was assessed on the property of the Great Western Railway Company to the amount of 54*l.* 7*s.*, upon a value of 2174*l.*

The borough of Maidenhead consists of parts of the two parishes of Cookham and Bray. Each of the said parishes is partly within and partly without the borough. The parts of the said parishes within the borough differ from each other in extent. The borough maintains its own police. The whole of the borough is regularly watched by day and night: and, on the 28th of November, 1856, the town council made a watch-rate at 6*d.* in the pound under the provisions of the 5 & 6 W. 4, c. 76, the 2 & 3 Vict. c. 28, and the 3 & 4 Vict. c. 28.

The appellants are the Great Western Railway Company; and a part of their line of railway runs through that part of the parish of Bray which is situate in the said borough; and the Town Council rated the appellants, in common with the other owners and occupiers of hereditaments in the borough, to the above-mentioned watch-rate.

*654] The said rate was duly allowed by two of Her Majesty's justices of the peace in and for the said borough, and was published by affixing notices of the same on or near the doors of all the churches and chapels in the borough, the parish church at Bray and Cookham, and on the outer door of the town hall.

The rate or assessment in question was headed as follows:—

“An assessment for carrying into effect the purposes of an Act of Parliament made and passed in the 5th and 6th years of the reign of King William the 4th, intituled ‘An Act to provide for the regulation of municipal corporations in England and Wales,’ and a certain other Act of Parliament made and passed in the 2d and 3d years of the reign of Queen Victoria, intituled ‘An Act for more effectually assessing and levying watch-rates in certain boroughs,’ and a certain other Act of Parliament made and passed in the 3d and 4th years of the reign of Queen Victoria, intituled ‘An Act to explain and amend an Act of the 2d and 3d years of her present majesty, for more equal-”

assessing and levying watch-rates in certain boroughs,' for the watching of the borough of Maidenhead, in the county of Berks, made and assessed the 28th day of November, 1861, being the watch-rate of 6d. in the pound for the ensuing year.

"EPHRAIM DAVEY, Overseer."

That part of the rate which relates to the Great Western Railway Company is as follows:—

Borough of Maidenhead, Bray watch-rate, made 28th day of November, 1862.

Number.	Name of occupier.	Name of owner.	Description of property rated.	Name or situation of property.	Estimated extent.	Estimated rental.	Rateable value.	Rate at 6d. in the pound.
1	Great Western Railway.	Great Western Railway.	Trunk line and traffic.	In the borough of Maidenhead.	36a. 2r. 2p.	2890l.	2174l.	64l. 7s. 0d.

*Payment of the above rate or assessment was duly demanded of the superintendent of the Company at the Maidenhead and Taplow railway station, and was refused; and thereupon the said company was summoned to pay the rate. [*655]

At the time of the passing of the 5 & 6 W. 4, c. 76, no watch-rate had been made or levied in the said part of the borough where the station-house, trunk line, and land respectively mentioned in the said rate were situated at the time of making the said rate.

At the time of passing the said Act of 5 & 6 W. 4, c. 76, the line of railway was not made, nor the station-house built, and no traffic was in course of being carried; and at that time the whole of the property now belonging to the railway company, and which is now rated, was beyond two hundred yards of a street or continuous line of houses.

At the time of the passing of the said Act of 5 & 6 W. 4, c. 76, the said premises and property which at the time of making the said rate belonged to the appellants, were not, nor was nor had any part thereof ever been, watched by the said borough, or by any person employed by or on behalf of the said borough; and the same respectively were the private property of the appellants.

Watch-rates for several years previous to 1856, had been levied by the Town Council on certain parts of the borough in which the property of the Great Western Railway was not situated, under the 5 & 6 W. 4, c. 76, and to which the Great Western Railway Company were therefore not assessed; but the assessment was made only on those whose property was watched.

In November, 1856, the town council made an order that the whole of the borough should be regularly watched by day and by night, established a *constabulary force for that purpose, and declared the whole borough liable to the watch-rate. The [*656] borough fund, with the aid of the amount only of watch-rate which could be raised under the provisions of the 5 & 6 W. 4, c. 76, and without the aid of any borough rate, was insufficient for watching the whole borough: and the town council levied a watch-rate on the

occupiers of all messuages, lands, tenements, and hereditaments within the borough.

The said station-house, railway, trunk line, and property so rated as aforesaid, except a small portion of the property extending about one hundred yards, were and each of them respectively was situated in a part of the said borough which at the time of the making of the said rate was and still is more than two hundred yards distant from any street or continuous line of houses regularly watched within the said borough under the provisions of the 5 & 6 W. 4, c. 76. The rateable value of such portion as at the time of making the said rate was within two hundred yards did not exceed 100*l*.

The watch-rate authorized by the 5 & 6 W. 4, c. 76, to be levied on the property within the said borough which is liable to be rated within the provisions of that Act, was at the time of making the said rate or assessment sufficient for the purpose of defraying the expenses of watching that part only of the borough which was watched: nor was the borough fund of the said borough at that time sufficient for the purpose of paying for all the expenses provided for and necessarily incurred in carrying out the provisions of the said Act.

The justices made an order that the railway company should forthwith pay the whole amount of the rate; and that, in default of payment, a warrant of distress should be issued.

*657] *The questions for the opinion of the Court were,—whether upon the facts stated, and waiving all technical objections and errors in form, the appellants were liable to pay the whole of the above watch-rate so assessed upon them; and whether the said rate was good in whole.

If the Court should be of opinion that the appellants were liable to pay the whole amount claimed and ordered by the said justices to be paid, the decision of the said justices was to be confirmed: and, if the Court should be of opinion that the appellants were not liable to pay the whole claim made against them for the said rate, then the determination of the said justices was to be reversed. It was agreed, that, whichever way the Court should decide, each party should pay their own costs.

*658] *Griffiths*, for the appellants.(a)—The appellants are *not liable to be assessed to the rate in question. By the 92d section of the Municipal Corporation Act, 5 & 6 W. 4, c. 76, all the corporate

(a) The points marked for argument on the part of the appellants were as follows:—

"1. That, at the time of the passing of the 5 & 6 W. 4, c. 76, the appellants' premises for which they are rated, were situated in a part of the borough of Maidenhead in and for which no watch-rate was levied, and more than two hundred yards distant from any street or continuous line of houses regularly watched in the said borough under the provisions of the said Act, and therefore the said premises were and are, under the proviso in s. 92 of the said Act for that purpose, exempt from and not liable to be included in or rated to the watch-rate:

"2. That the mere fact that a small portion of the premises has since the passing of that Act become less than two hundred yards distant from a street or continuous line of houses regularly watched, does not affect or abridge the exemption aforesaid, or render the premises, or any part of them, liable to be included in or rated to the watch-rate:

"3. That, if the fact mentioned in the second point does affect the exemption aforesaid, it only does so to the extent of that part of the premises within the said distance of two hundred yards, and not to the part beyond, which is still exempt and not liable to be included in or rated to the watch-rate:

"4. That it appears upon the facts stated in the case that the appellants' premises included in the said rate are not liable to be included in or rated to the watch-rate."

property is to be carried to an account to be called the "borough-fund," out of which all disbursements are to be made; and, if that fund should prove insufficient, the deficiency is to be made up by a borough-rate. Then comes a proviso, that, "in every case in which before the passing this Act any rate might be levied in any borough, or in any parish or place made part of any borough under the provisions of this Act, for the purpose of watching solely by day or by night, or for the purpose of watching by day or by night conjointly with any other purpose, it shall be lawful for the council of such borough to levy a watch-rate sufficient to raise any sum not greater than the average yearly sum which during the last seven years, or, where such rate shall not have been levied during seven years, then during such less number of years as such rate shall have been levied, shall have been expended in the maintenance and establishment of watchmen, constables, patrols, or policemen within the district in which such rate was levied, and for that purpose the council shall have all the powers hereinbefore given to the council in the matter of the borough-rate." The section then goes on,— "And where any part of any borough shall not at the time of the passing of this Act be within the provisions of the Act authorizing the levy of such rate for watching as aforesaid, it shall be lawful for the council from time to time to order that such part, or so much thereof as to the *coun- [*659
cil shall seem fit, shall be rated to the watch-rate in like man-
ner as other parts of the borough to be specified in such order, and such watch-rate thereupon shall be levied within the part mentioned in such order in like manner as in the other parts of the borough so specified, and all such sums levied in pursuance of such watch-rate shall be paid over to the account of the borough-fund." Then follows this further proviso,— "that no such order as *last aforesaid* shall be made for rating to such watch-rate any part of any borough in which at the time of passing this Act such rate as aforesaid shall not be levied, and which is more than two hundred yards distant from any street or continuous line of houses which shall be regularly watched within the borough under the provisions of this Act." At the time of the passing of that Act, the appellants' property had never been rated to the watch-rate, and was not within the distance of two hundred yards of any street or continuous line of houses which was watched under the provisions of the Act; but a portion of it has become so since. [ERLE, C. J.—In *Hallett v. The Overseers of Brighton*, 7 Ellis & B. 342 (E. C. L. R. vol. 90), it was held that the part within the two hundred yards might be rated.] The Court there assume that the exemption continued: but the point was not made. The question turns upon the 2 & 3 Vict. c. 28, and 3 & 4 Vict. c. 28. The 1st section of the 2 & 3 Vict. c. 28, recites that, "whereas, by reason of the restrictions contained in the 5 & 6 W. 4, c. 76, the watch-rate authorized by the said Act to be levied upon those parts of the boroughs within the provisions of the said Act which are regularly watched, is insufficient for that purpose, and the deficiency in many cases is paid out of the borough-rate, to which all parts of the borough, whether or not regularly watched, are liable:" and, for remedy thereof, enacts "that it shall be lawful for the *council of any [*660
borough named in either of the schedules to that Act to levy

a watch-rate upon the occupiers of all messuages, lands, tenements, and hereditaments within those parts of the borough which shall be watched by day and by night, and which from time to time, by any order of the council of any such borough, shall be declared liable to such water-rate," &c. "Provided always that no such rate shall exceed in any one year the rate of 6*d.* in the pound on the net annual value of the hereditaments rated thereunto, unless in those boroughs in which at the time of passing the said Act the sum authorized by the said Act to be levied by way of watch-rate exceeded the sum which might have been then raised by the said rate of 6*d.* in the pound; and in such cases as last aforesaid it shall be lawful to levy a watch-rate under this Act upon all the hereditaments liable thereunto, at such rate as would have sufficed to raise such greater sum: Provided also that nothing herein contained shall be construed to extend to make liable to the watch-rate any lands, tenements, or hereditaments which are now exempted by any local Act from the payment of watch-rates, or to alter the comparative liability of any lands, tenements, or hereditaments to the watch-rate, which by any local Act are now, in respect of any watch-rate, entitled to any deduction from or chargeable with any increase upon an equal pound-rate; but the like comparative deductions and increased charges shall be made in respect of such hereditaments in the rates to which such hereditaments shall be rated under this Act." It is submitted that that Act does not take away any of the exemptions contained in the 5 & 6 W. 4, c. 76; and that, if it did, they are continued by the 3 & 4 Vict. c. 28. This last-mentioned Act recites that "doubts have been entertained whether the 2 & 3 Vict. c. 28 may not apply to cases of municipal boroughs in *661] which *there are borough-funds sufficient for the purpose of defraying the expenses of the constabulary force of such boroughs, together with all other expenses payable out of the borough-fund, with the aid of the amount only of watch-rate which could be raised under the provisions of the 5 & 6 W. 4, c. 76, and without the aid of any borough-rate; and that doubts are also entertained whether by the 2 & 3 Vict. c. 28, it is not imperative upon the council of each borough to levy in each borough a watch-rate to the extent of 6*d.* in the pound:" and, in order to remove such doubts, it enacts "that the said Act (2 & 3 Vict. c. 28) shall not apply or be deemed to apply to any borough in which the borough-fund is sufficient, with the aid of the amount only of watch-rate which could be raised under the provisions of the 5 & 6 W. 4, c. 76, and without the aid of any borough-rate, to defray the expense of the constabulary force of the borough, together with all the other expenses legally payable out of the borough-fund by virtue of the 5 & 6 W. 4, c. 76, or any other Act or Acts of Parliament." And then follows a proviso expressly re-enacting the reservation of all rights of property and beneficial exemptions in the 5 & 6 W. 4, c. 76, s. 2. Upon these grounds, it is submitted that the decision of the justices was wrong.

Gray, contra.(a)—This case falls clearly within the 2 & 3 Vict. c. 23,

(a) The points marked for argument on the part of the respondents were as follows:—

"1. The facts being, that the appellants' property which is rated is within the borough, that the whole of the borough was watched by day and by night, and that the whole of the borough was by an order of council declared liable to the watch-rate, the case is brought within the

s. 1, and the rate is a perfectly valid *one. By the 92d section of the 5 & 6 W. 4, c. 76, the borough-fund was to be charged [*662 with the expense of watching, and a watch-rate was to be made in a certain limited manner to aid that fund, if found insufficient. Then comes the 2 & 3 Vict. c. 28, which extends the area over which the rate is to be made. That statute enacts "that it shall be lawful for the council of any borough to levy a watch-rate upon the occupiers of all messuages, lands, tenements, and hereditaments within those parts of the borough which shall be watched by day and by night, and which from time to time by any order of the council of any such borough shall be declared liable to such watch-rate." And there is nothing in the 3 & 4 Vict. c. 28 to revive the exemption. [He was stopped by the Court.]

ERLE, C. J.—It appears to me that the order of the justices in this case was properly made, and must be affirmed. The original power to make a watch-rate within the borough was by the 92d section of the Municipal Corporation Act, 5 & 6 W. 4, c. 76, limited to property situate within or within two hundred yards of "any street or continuous line of houses which should be regularly watched within the borough under the provisions of that Act." If a watchman did not pass within two hundred yards, the property was not to be rated. The burthen was cast upon the property which was benefited by the watching. That was one of the *exemptions contained in the Municipal Corporation Act. Then came the 2 & 3 Vict. c. 28, which [*663 was expressly passed to take away some of the restrictions and exemptions contained in the former Act, and for more equally assessing and levying watch-rates: and it authorizes the council of the borough "to levy a watch-rate upon the occupiers of all messuages, lands, tenements, and hereditaments within those parts of the borough which shall be watched by day and by night, and which from time to time by any order of the council of any such borough shall be declared liable to such watch-rate." The case falls within the just principle before adverted to. The council of the borough have come to the conclusion that this property ought to be rated, and have made an order accordingly. That being so, the appellants were properly rated under the 2 & 3 Vict. c. 28: and there is nothing in the 3 & 4 Vict. c. 28 to take away that liability, the restrictions there referred to not applying to property held by such a company as a railway Company. There is nothing, therefore, to take this case out of the operation of the 2 & 3 Vict. c. 28.

The rest of the Court concurring,

Appeal dismissed, with costs.

statute 2 & 3 Vict. c. 28, s. 1. The rate is good in whole, and the appellants are liable to pay the whole of the rate:

"2. The fact that the appellants' property either now or at any previous time is or was more than two hundred yards distant from any street or continuous line of houses regularly watched under the provisions of the Municipal Corporation Act, 5 & 6 W. 4, c. 76, furnishes no ground of exemption from the rate; because, although an exemption on that ground is found in the 92d section of the Municipal Corporation Act, it is not in the aforesaid Act under which the rate in question is made."

*664] *CHURCH v. THE ENCLOSURE COMMISSIONERS.

RE OLD OAK COMMON.

Jan. 31.

The Court granted a prohibition against the Enclosure Commissioners, to prohibit them from proceeding with an enclosure under the 8 & 9 Vict. c. 118, where the Assistant Commissioner had, in taking the consents and dissents under s. 27, excluded from his estimate of the interest of the owner of the soil of the land to be enclosed, and over which rights of common existed or were claimed, the value of the brick earth thereunder, which would have more than sufficed to overtop the consents to the enclosure,—notwithstanding the provisional order contained the following so called exception,—“that all mines, minerals, stone and other *substrata* be reserved to C., with a right to enter the said lands when enclosed, for the purpose of opening, working, or winning such mines, minerals, stone, and other *substrata*, making compensation for any damage to the surface which may thereby be done.”

MANISTY, Q. C., in Michaelmas Term last, on behalf of Mr. Henry John King Church, obtained a rule calling upon the Enclosure Commissioners for England and Wales to show cause why a writ of prohibition should not issue to prohibit them from reporting the proposed enclosure of Old Oak Common, in the parish of Acton, in the county of Middlesex, for the sanction of Parliament, or from taking any further steps towards the enclosure of the said common, without first obtaining the consent of the said Henry John King Church, or without first obtaining in the manner prescribed by the 8 & 9 Vict. c. 118, the consent of persons the aggregate amount of whose interest in the land proposed to be enclosed should not be less in value than two-thirds of the whole interest in such land, including the interest of the said Henry John King Church as owner of the soil, with the mines, minerals, stone, and other *substrata* under such land.

The affidavit on which the motion was founded disclosed the following facts:—Old Oak Common formerly constituted part of the manor of Sutton Court, of which the Dean and Chapter of St. Paul's were lords. In the year 1800 they sold it under the provisions of the Land-tax Act 39 G. 3, c. 21; and in 1849 Mr. Church became possessed of it. It consisted then of an open tract of land containing about 140
*665] acres. In April, 1861, certain persons who claimed rights of
*common over the land applied to the Enclosure Commissioners to deal with it under the Enclosure Acts; and on the 31st of September, the following provisional order was made:—

“Whereas, persons interested in certain lands called or known as Old Oak Common, in the parish of Acton, in the county of Middlesex, being land subject to be enclosed under the provisions of the Acts for the enclosure, exchange, and improvement of land, and proposing to enclose the same under the said Acts, have made due application to the Enclosure Commissioners for England and Wales to sanction such enclosure: And whereas it has been made to appear to the said Commissioners that the persons making the said application represent at least one-third in value of the interest in the said lands: And whereas the said Commissioners, on the statements contained in the said application, thought the enclosure of the said lands might be found to be expedient, and accordingly referred the said application to Nathan Wetherell, Esq., an Assistant Commissioner under the said Acts: And whereas the said Assistant Commissioner, after having caused due

notice to be given as required by the said Acts, and having inspected the said lands, held, pursuant to the said notice, a meeting on the 7th day of June, 1861, at the George Inn, in the said parish, to hear any objections which might be made to the said proposed enclosure, and any information or evidence which might be offered in relation thereto, and inquired into the correctness of the statements in the said application, and otherwise into the expediency of the said proposed enclosure: And whereas the said Assistant Commissioner duly reported in writing to the said Commissioners the result of his inquiries as to the statements contained in the said application, and his opinion as to the expediency of the said proposed *enclosure, with his reasons for such opinion, and annexed to his report a sketch of his said [*666 lands: And whereas we the said Commissioners are of opinion that the said proposed enclosure would be expedient, and, in case the necessary consents be given, and the requisites of the said Acts be otherwise complied with, intend to certify, in our annual general report, the expediency of such enclosure upon the terms hereinafter mentioned: Now, therefore, in pursuance of the power given to us by the said Acts, we, the Enclosure Commissioners for England and Wales, do by this provisional order under our seal declare the following to be the terms and conditions on which we are of opinion that the said enclosure should be made, that is to say,—that three acres at or near the spot marked A. on the plan hereto annexed be allotted for the labouring poor; *and that all mines, minerals, stone, and other substrata be reserved to Henry John King Church, Esq., with a right to enter the said lands when enclosed, for the purpose of opening, working, or winning such mines, minerals, stone, and other substrata, making compensation for any damage to the surface which may thereby be done.* In witness," &c.

The ground of complaint was that there was a large quantity of valuable brick-earth under the surface of the land, the value of which the Assistant Commissioner had declined to take into consideration in valuing Mr. Church's interest, as it was alleged he was bound to do. It was sworn, that the value of Mr. Church's interest in the land proposed to be enclosed, even on the assumption of the said land being subject to all the rights of common claimed thereon, far exceeded, according to any fair and reasonable estimate thereof, the aggregate value of all such rights of common and all other rights therein or thereon. The 8 & 9 Vict. c. 118, ss. 16, 22, 23, 27, 29, and the cases of *Towneley v. *Gibson*, 2 T. R. 701, and *Smith v. Smith*, 2 Price 101, were referred to. [*667

Borill, Q. C., and *F. M. White*, now showed cause, upon the affidavits of Mr. J. M. White, solicitor to the Enclosure Commissioners, and of Mr. Wetherell, the Assistant Commissioner.(a)—The provisional

(a) Mr. White's affidavit stated, that, by a certain indenture of bargain and sale preserved among the records in the custody of the Master of the Rolls, deposited in the public record office in London (Close Rolls, 3 G. 4, p. 9, 1822), bearing date the 24th of July, 1800, and made between the Dean and Chapter of the Cathedral Church of St. Paul, in London, of the first part, two of the Commissioners of the land-tax appointed by virtue of the Acts for the redemption of the land-tax of the 38th and 39th G. 3, of the second part, and William Duke of Devonshire of the third part, and being a bargain and sale, amongst other hereditaments, of "All that the site, capital messuage, or mansion-house of the manor or lordship of Sutton Court, in the parish of Chiswick, in the county of Middlesex; and all that rectory or parsonage impropriate of Chiswick aforesaid, and the wood called the Old Holt, and all messuages, houses, edifices, buildings, demesne lands, meadows, pastures, feedings, trees, woods, underwoods, ways,

*668] order having *excepted "mines, minerals, stone, and other substrata," any under ground rights Mr. Church may have are amply secured to him unaffected by the proposed enclosure. If the minerals are excepted, their value clearly ought not to be considered

waters, watercourses, glebe lands, tithes, fruits, profits, commodities, and appurtenances to the said manor or lordship or to the aforesaid rectory or parsonage, or either of them, belonging or in any wise appertaining, except as therein excepted:" and amongst such exceptions were all lands grantable by copy of court roll, courts, fines, and other profits thereof, and all heriots whatsoever to the said manor belonging; and also full and free liberty for the said Dean and Chapter and their successors to keep and hold any of the said Courts in any place within the said manor, at their free will and pleasure, when and as often as they should see fit.

The wood called the "Old Holt" is the same as is now called the "Old Oak Wood" or Common, part whereof is said to be in the parish of Acton, in the county of Middlesex, and was purchased of William Spencer, Duke of Devonshire, the successor in estate of the said William, Duke of Devonshire, by an ancestor of Mr. Church who now claims to be the owner thereof, in or about the year 1822, by the description of "All that wood or common in Acton aforesaid called the Old Holt Wood or Old Holt Common, containing 200 acres or thereabouts, be the same more or less, as the said William Spencer, Duke of Devonshire, has any right or interest in or to the same as owner of the soil thereof."

Before the sale to the said ancestor of Mr. Church, the said Old Holt Wood or Common was put up for sale at the Auction Mart, among other estates at Turnham Green and Chiswick, on behalf of the then Duke of Devonshire, by Messrs. Driver, on the 25th of September, 1821; and in the printed particulars and advertisement of such sale Lot 20 is described as "Old Holt Common, at East Acton, being a villa residence (therein described), together with good kitchen-garden and pleasure-ground, with a wall and shrubbery round the paddock, which contains is the whole about three acres (a part of the above land has been enclosed within these few years from the common), and all such rights and interests as the vendor is entitled to as owner of the soil of the common called Old Oak Common, containing 200 acres, with the right of common of pasture and fuel thereon," and which premises are described as being in the occupation of a Mr. M'Nalty, and granted by a lease to the Hon. C. Hely Hutchinson for twenty-one years from Lady Day, 1812, and were purchased by the said ancestor of Mr. Church as aforesaid.

The manor of Sutton is now vested in the Ecclesiastical Commissioners for England, who are the lords thereof; and copyhold or customary Courts are held for the said manor in their name as such lords.

By virtue of the 12th section of the 39 G. 3, c. 21, the minerals under the said Old Holt or Old Oak Wood or Common did not pass by the deed of bargain and sale of the 24th of July, 1800; and by the operation of the Acts relating to the Ecclesiastical Commissioners, these minerals and all other the corporate property of the Dean and Chapter of St. Paul's are now vested in the said Ecclesiastical Commissioners.

As one of the solicitors to the said Ecclesiastical Commissioners, the deponent was instructed to apply to the Enclosure Commissioners, in case the enclosure of the said Old Holt or Old Oak Common shall proceed, to amend the provisional order issued by the said Enclosure Commissioners, by striking out the reservation of the said minerals to the said Mr. Church, and inserting a reservation to the said Ecclesiastical Commissioners as owners thereof.

The affidavit then verified two several reports to the Enclosure Commissioners made by their Assistant Commissioner, Mr. Wetherell, relating to the meetings held by him for hearing objections to the proposed enclosure of Old Oak Common, and for taking assents and dissents under the 27th section of the General Enclosure Act, 8 & 9 Vict. c. 118.

Mr. Wetherell's affidavit was in substance as follows:—

Some time previously to the year 1859, the North and South-Western Junction Railway Company, under the powers of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), took a portion of Old Oak Common, for the purposes of their Act.

The Company entered into an agreement with Mr. Church for payment to him of a sum of money as a compensation for his interest in the soil of the portion of the common so taken; and they also entered into an arrangement with a committee of the persons who claimed rights of common over Old Oak Common, for payment to them of a sum of money as a compensation for the extinguishment of their rights of common of pasture over the portion of the common so taken.

The deponent was appointed by the Enclosure Commissioners to apportion the sum so paid by the Company for the extinguishment of the rights of common, among the parties entitled to the said rights.

The deponent held meetings in the year 1859, and subsequently; and he ascertained as far as he was able the parties entitled to such rights of common, and the premises in respect of

in ascertaining the *relative amount of assents and dissents. [*669 But it is submitted that this is not the subject of prohibition at all. The matter is left to the Commissioners; and, if they are satisfied that the parties assenting to the proposed enclosure possess two-thirds in value of the *whole interest in the land, that is [*670 conclusive. They are then to make a provisional order, to hear objections, and to make their report to Parliament. The lands

which such rights had been exercised, and the proportions in which the said parties were entitled to the compensation fund.

Among the parties so claiming rights of common of pasturage, Mr. Church, in respect of a farm situate in the parish of Acton, claimed a right of common of pasturage over Old Oak Common, and received in compensation for such right a proportionate part with the other persons entitled to such rights of common, of the sum so paid by the said railway Company.

In the course of the investigation for ascertaining the rights of the parties, it was proved by several witnesses, that, at all times within the memory of man, owners of lands and tenements within the parish of Acton had by their cattle constantly depastured Old Oak Common without interruption.

In calculating the interests and proportions of the different parties so claiming to divide such compensation-money, including Mr. Church, the deponent adopted the proportion to which each party was assessed to the poor-rate in respect of the land to which the claim to right of pasturage over such common was attached, in like manner as he made a similar calculation in the proceedings of the enclosure of the said common as hereinbefore mentioned.

After such proceedings in respect of the said railway compensation money, and in consequence of Mr. Church asserting (as the deponent was informed by several of the commoners) that he was the sole owner of Old Oak Common, and of the entire pasturage over it, free from all rights of common whatever, and of his proceeding to enforce his alleged claim, an application was made to the Enclosure Commissioners by certain of the landowners in the parish of Acton claiming rights of common over the said Old Oak Common, for an enclosure of the same, under which enclosure proceedings all claims could be tried and disposed of.

By the direction of the Enclosure Commissioners, the deponent held the usual meeting to hear objections to the said enclosure, and also a meeting for the purpose of taking assents and dissents under section 27 of the General Enclosure Act.

At the last-mentioned meeting, Mr. Church by his counsel alleged that the minerals under Old Oak Common are of great value, and that the same, if added to the value of the interests of the non-assenting or dissenting parties, would raise the values of the interests of such non-assenting or dissenting parties to a proportion of more than one third part of the total interests.

The mines and minerals had upon the alleged title of Mr. Church been reserved to him by the provisional order of the Enclosure Commissioners: and, as the minerals were so reserved, and were not to be dealt with under the enclosure, the deponent declined to take them into account in ascertaining the values of the interests.

In calculating the interests of the assenting and dissenting parties, it became necessary to assign some proportion of value to the soil. Except under special circumstances, the usual proportion of value attributed to the soil,—as will appear by the reports of the Enclosure Commissioners,—is one fifteenth or one sixteenth part of the entire interests: and in the present case the deponent attributed to the soil a value of one fifteenth of the entire interests, less the value of the minerals.

Inasmuch as Old Oak Common is not now waste of a manor, it became unnecessary to obtain the consent of Mr. Church to the enclosure as owner of the soil; and, having ascertained the interests in the mode prescribed by the General Enclosure Act, viz. the rateable values at which the common-right premises of those parties who in his opinion proved that they were entitled to rights of common were assessed to the relief of the poor, and after allowing and deducting one fifteenth part of such rateable values as representing the value of the soil, the deponent ascertained that the interests of the assenting parties exceeded two third parts of the values of the entire interests.

In attributing the proportional value of one fifteenth part to the soil of Old Oak Common, the deponent expressly stated to the other parties present at the meeting that this proportion was allowed solely for the purpose of the calculations which he was required to make at the meeting; but that it was open to the owner of the soil to prove, if he could, to the valuer, who is the proper officer to determine its value, that circumstances existed under which a greater proportion than one fifteenth part ought to be allotted and assigned to the ownership of the soil.

which are subject to enclosure are described in s. 11 of the General Enclosure Act, 8 & 9 Vict. c. 118, *and are, amongst others,
 *671] "all lands subject to any rights of common whatsoever, and whether such rights may be exercised or enjoyed at all times, or may be exercised or enjoyed only during limited times, seasons, or periods,
 *672] or be subject to any suspension or *restriction whatsoever in respect of the time of the enjoyment thereof." The 25th section enacts that "any persons interested in land subject to be enclosed and proposing to enclose the same under this Act, may make application to the Commissioners according to the form which may have been circulated as aforesaid (s. 24) by the Commissioners to sanction such enclosure, or to certify in their annual general report (under s. 3) the expediency of such enclosure, as the case may require; and in case the Commissioners shall, on the statements contained in such application, think that the enclosure of such land, or of some part thereof, may be found to be expedient, they shall refer such application to an Assistant Commissioner, who shall inspect the land proposed to be enclosed, and inquire into the correctness of the statements in such application, and otherwise into the expediency of the proposed enclosure; and such Assistant Commissioner shall hold a meeting or meetings to hear any objections which may be made to the proposed enclosure, and any information or evidence which may be afforded in relation thereto, and may adjourn such meetings respectively, and shall cause notice to be given on the church door of the parish in which the land proposed to be enclosed, or the greater part
 *673] thereof, shall be situate, *and also a like notice to be given by advertisement of the time and place of every such meeting, fourteen days at least before every such meeting (meetings by adjournment only excepted): Provided, nevertheless, that it shall not be lawful for the Commissioners to refer such application to the Assistant Commissioner, nor for the Assistant Commissioner to take any further proceedings upon any such application, unless it shall be made to appear to him or them respectively that the persons making such application represent at least one-third in value of the interests in the lands therein proposed to be enclosed." The 26th section enacts "that the Assistant Commissioner to whom such application shall be referred shall report in writing to the Commissioners the result of his inquiries as to the statements contained in the application, and his opinion as to the expediency or inexpediency of the proposed enclosure, with the reasons for such opinion; and, in case he shall think such enclosure expedient, he may specify any terms or conditions which may appear to him to be proper for the protection of any public interests, or of any mineral property or peculiar rights in relation to the land proposed to be enclosed," &c. And s. 27 enacts, that, "if, on the report of the Assistant Commissioner, or after any further inquiries they shall think necessary in relation thereto, the Commissioners shall be of opinion, having regard as well to the health, comfort, and convenience of the inhabitants of any cities, towns, villages, or populous places in or near any parish in which the land proposed to be enclosed or any part thereof shall be situate, as to the advantage of the proprietors of the land to which such application shall relate, that the proposed enclosure would be expedient, the Commissioners, by pro-

visional order under their seal, shall set forth the terms and conditions on which they shall be of opinion that the enclosure should be made, and *especially the quantity and situation of the allotments (if any) which under the provisions of this Act should be appropriated for the purposes of exercise and recreation and for the labouring poor, and, in case the lord of the manor shall be entitled to the soil of the land proposed to be enclosed, shall specify the share or proportion of the residue of the land which, after provision made for the payment of expenses, in case the expenses shall under the provisions hereinafter (s. 124) contained be so directed to be paid by sale of land, and after deducting the allotments to be made for public purposes, should be allotted to the lord of the manor in respect of his right and interest in the soil, either exclusively or inclusively of his right or interest in all or any of the mines, minerals, stone, and other substrata under such land, or inclusively or exclusively of any right of pasturage which may have been usually enjoyed by such lord or his tenants, or any other right or interest of such lord in the land to be enclosed, as the case may appear to the Commissioners to require, or as the parties interested, with the approbation of the Commissioners, may have agreed, and in case there shall be any mineral property, or any rights in relation thereto, not vested in the lord of the manor, or other rights which shall appear to the Commissioners proper to be specially provided for upon such enclosure, or to be excepted from the operation thereof, shall specify the provisions or exceptions which should be made in that behalf; and the Commissioners shall thereupon cause notice to be given of their intention to authorize the proposed enclosure, or (as the case may be) to certify in their annual general report the expediency of the proposed enclosure, but upon the terms and conditions in such order expressed, and in case the consents required by this Act should be given within the time in such notice *specified, or within any enlarged time which the Commissioners may allow for that purpose; and the Commissioners shall cause to be deposited for inspection a copy of such provisional order in the parish or place in which the land proposed to be enclosed, or some part thereof, shall be situate, and may, in case they shall think fit, cause meetings to be holden by an Assistant Commissioner for the purpose of taking consents and dissents, or of ascertaining the interests of consenting or dissenting parties, or give such direction as to the mode of taking and verifying consents as they shall think fit; and, in case it shall appear to the satisfaction of the Commissioners that persons the aggregate amount of whose interests in the land proposed to be enclosed shall not be less in value than two-thirds of the whole interest in such land, and the other persons, if any, whose consents may be necessary under the provisions hereinafter contained, shall have consented to such enclosure upon the terms and conditions in such order expressed, then, if the land proposed to be enclosed cannot be enclosed under this Act without the previous direction of Parliament, the Commissioners shall in their next annual general report certify their opinion that the proposed enclosure would be expedient, with such particulars in relation thereto, or to the terms and conditions aforesaid, as they shall think necessary," &c. The 98th section pro-

vides, that, "in every case in every case in which the right to all or any of the mines, minerals, stone, and other substrata under any land enclosed under this Act shall exist as property distinct and separate from the property in the surface, and shall not be compensated upon the enclosure, the right and property in such mines, minerals, stone, or other substrata, and all rights and easements auxiliary to or connected with the exercise or enjoyment of the right and property in *676] such mines, minerals, stone, or *other substrata, shall be in nowise affected by the enclosure; and, in case any mines, minerals, stone, or other substrata under any land enclosed under this Act, or the right of searching for or getting the same, shall have been leased or agreed to be leased to any person as property distinct and separate from the property in the surface, with or without powers over the surface of the land auxiliary to the purposes of such lease, the rights of the lessee or tenant under such lease or agreement shall be in nowise affected by the enclosure." The 29th section gives a veto to the lord of the manor: it enacts, that, "when the land to which such application shall relate shall be waste of any manor, or land within any manor to the soil of which the lord of such manor shall be entitled in right of his manor, then, unless there shall be more than one person interested in such manor according to the definition of this Act, the Commissioners shall not proceed to an enclosure on such application, or certify in their annual general report the expediency thereof, unless the person interested in the land subject to be enclosed as aforesaid in right of such manor, or his substitute under this Act, shall consent to such enclosure; and where there shall be more than one person interested in such manor, the Commissioners shall not proceed to an enclosure, or certify as aforesaid the expediency thereof, in case such persons, or the majority of such persons in respect of interest, shall signify their dissent within the time limited by the Commissioners." But Church is not lord of the manor. As well might Mr. Grubb have claimed a veto in his case: see *Grubb v. The Enclosure Commissioners*, 9 C. B. N. S. 612 (E. C. L. R. vol. 99). [ERLE, C. J.—Your contention is, that, if the Commissioners think proper to decline to take a claim into consideration, their decision is final, and we cannot interfere?] Precisely so: the party who thinks *677] himself aggrieved *must go to Parliament. The Assistant Commissioner has obtained the consent of two-thirds in value of the interests in the land proposed to be enclosed; and he was not bound to take into consideration Church's supposed interest in the substrata. The enclosure professes to deal only with the surface of the land. Church's interest, if he has any, in the minerals, is reserved to him by the exception, and the Commissioners propose to allot him one-fifteenth of the surface. Further, it is submitted that Church has no interest in the minerals. His ancestor purchased the land under the powers of the Land-Tax Redemption Act, 39 G. 3, c. 21. By the 12th section(a) of that Act, the mines and minerals are vested in the

(a) Which enacts that "no mines, or minerals, or seams or veins of coal, metals, or other profits of the like nature, belonging to any manors, messuages, lands, tenements, or hereditaments, which shall be sold by any bishop or other ecclesiastical corporation aforesaid, for the purpose of redeeming any land-tax, whether the same shall be opened or unopened, nor any right, title, or claim to open or work the same, &c., shall pass by any conveyance of such manors,

Ecclesiastical Commissioners, whose consent the Enclosure Commissioners have obtained; and the provisional order will be amended in this respect under the 9 & 10 Vict. c. 70, s. 1. The case of *Smith v. Smith*, 2 Price 101, has no bearing upon the present case: the only question there was, whether the person claiming was the person described in the Enclosure Act, lord or a person claiming *to be lord of the manor. [ERLE, C. J.—It is demonstrable here that Church is not lord of the manor.] [*678]

Manisty, Q. C., and *Kemplay*, in support of the rule.—The Commissioners are clearly assuming to deal with a valuable right of Mr. Church. He is the owner of the soil, including the brick-earth: this they purpose to take from him, leaving him the barren right to work it, paying compensation for surface damage. This is a perfect mockery. [ERLE, C. J.—The lord may approve: but I do not know that a purchaser has the same right.] The only question here is, whether the Commissioners have proceeded upon the right principle in ascertaining whether or not the proper proportion of assents have been given to the proposed enclosure. It is submitted that they have no power to except from the operation of the enclosure anything but what exists at the time as a separate property; that the exception of that which they have a right to except does not exclude the party from the right of voting on the question of enclosure; and that there is in fact no exception in this provisional order. The application here was for the enclosure of Old Oak Common. It cannot be disputed, that, under s. 16, the owner of the substrata is a person "interested in land subject to be enclosed under the Act," and a person who under s. 25 might have applied for the enclosure, and to whom the valuer might assign an allotment. The application is for an enclosure of the common in solido: and the provisional order is, "that three acres at or near the spot marked A. on the plan hereto annexed be allotted to the labouring poor; and that all mines, minerals, stone, and other substrata be reserved to Church, with a right to enter the said lands, when enclosed, for the purpose of opening, working, or winning such mines, minerals, stone, or other substrata, making *compensation for any damage to the surface which may thereby be done." [*679] [WILLIAMS, J.—That is applicable to something to be done beneath the land, leaving the surface available for the ordinary purposes, not to brick-earth, which cannot be taken without destroying the surface.] "Minerals," in the 12th section of the 39 G. 3, c. 21, as well as in the 98th section of the 8 & 9 Vict. c. 118, means coal, iron-stone, and the like, and not that which lies immediately under the surface of the land.

ERLE, C. J.—I am of opinion that this rule for a prohibition should be made absolute. It appears to me that Mr. Church clearly is interested in the land proposed to be enclosed in respect of the brick-earth, and in respect of which interest his assent to the enclosure has not been obtained. It is certainly part of the land proposed to be en-

messuages, lands, tenements, or hereditaments, either by express or general words in such conveyance; and such mines or minerals, seams or veins of coal, metals, or other profits aforesaid, &c. shall be always absolutely excepted and reserved to such bishop or other ecclesiastical corporations aforesaid, as fully and effectually to all intents and purposes as if the same were in such conveyance expressly excepted and reserved."

closed. It was contended, on showing cause against the rule, that the brick-earth has been taken out of the operation of the provisional order by reason of the exception or reservation at the end thereof,—“that all mines, minerals, stone, and other substrata be reserved to Henry John King Church, with a right to enter the said lands, when enclosed, for the purpose of opening, working, or winning such mines, minerals, stone, or other substrata, making compensation for any damage to the surface which may thereby be done.” I am of opinion, that, if brick-earth were clearly included within the words “mines, minerals, stone, and other substrata,” the reservation does not amount to an exception within the 12th section of the statute. Assuming that it did, it would not, I think, follow that the party entitled would not have a right to a voice with reference to the enclosure. I do not, however, go into that on this occasion, inasmuch as it is unnecessary *680] to say anything as to the course the *Commissioners, who must have abundance of experience, are accustomed to pursue in the matter. If the opposition rested upon this brick-earth being an exception out of the enclosure, it is clear to my mind that it must fail. Mr. Church has no separate property in the mines, minerals, and substrata. They are reserved to him, and he has a deep interest in what appears to be a very valuable subject; and yet he is excluded from an opportunity of expressing his dissent from the enclosure. I agree with Mr. White, that the words “mines, minerals, stone, and other substrata,” would be misapplied if they were supposed to include brick-earth. In many parts of the country, there may be an exclusive enjoyment of mineral property without very materially interfering with the enjoyment of the land by the owner of the surface. Brick-earth, however, does not come within that category: it cannot be got and worked with advantage without entirely (for the time, at least) destroying the surface. The Commissioners, therefore, clearly were not warranted in treating Mr. Church as an owner of mineral property. He clearly was within the general purview of the statute interested in the land proposed to be enclosed, in respect of the brick-earth, which ought to have been included in the valuation; and therefore I am of opinion that the Assistant Commissioner had no right to exclude him from counting in respect of that property amongst the persons assenting to or dissenting from the proposed enclosure.

WILLIAMS, J.—I am entirely of the same opinion. It is not disputed that Mr. Church is the proprietor of valuable property in Old Oak Common, in respect of his right to get brick-earth, if, in so doing, he does not interfere with the rights of those who are entitled to common of pasture there. If, therefore, the enclosure *proceeds, the *681] effect will be to deprive Mr. Church of a very valuable right, without giving him any compensation for it. If it is dealt with simply upon the footing of his being the proprietor of waste land over which there are existing rights of common, the effect will be, that, when the allotment comes to be made, he will only have an allotment proportionate to the value of that limited right. The brick-earth would only be reserved to him by virtue of the exception, as it is called, in the provisional order, of “mines, minerals, stone, and other substrata,” with a right to enter the lands when enclosed, for the purpose of opening, working, or winning such mines, minerals, stone, and other

substrata, "making compensation for any damage to the surface which may thereby be done." That, so far as Mr. Church's interest in the brick-earth is concerned, would be altogether illusory. If this were a case in which the right of the party consisted simply of a right to the minerals in the ordinary sense, that is, minerals which could be worked in the ordinary way under ground, leaving the surface or crust unaffected, there would be nothing illusory in the exception. Mr. Church would then have the minerals, and those to whom the surface was allotted, would, as is reasonable and just, have compensation for any injury they might sustain from his so doing. But, where the thing to be taken consists of the surface itself, if Mr. Church is to make compensation to the allottees, it will be neither more nor less than making him pay for the brick-earth itself. It is quite impossible to allow this manifest perversion of the meaning of the Act.

WILLES, J.—I am quite of the same opinion. It is more than likely, that, when this matter was discussed before the Assistant Commissioner, he had not the *advantage of such a full knowledge of the facts as we have acquired from the able arguments which [682] have been addressed to us. It is now perfectly clear, that, in dealing with what he supposed to be under-ground rights, the Assistant Commissioner was in reality dealing with the superficies. It is impossible not to see the justice of Mr. Church's claim after the investigation the case has undergone. The enclosure cannot be pursued any further.

KEATING, J.—I am of the same opinion. It seems to me that up to the point of the refusal to admit Mr. Church as a party assenting to or dissenting from the proposed enclosure, the proceedings of the Commissioners may have been perfectly regular. The application to the Commissioners is, to enclose the whole of Old Oak Common. They accordingly proceed to deal with the whole, and, as part, with the very property in question, and to make special provisions in respect of it, under ss. 25, 26, 27. It would be manifestly contrary to the spirit and intention of the Act that one with whose property the Commissioners are thus dealing should be excluded from having a voice in the matter. The case could not have been brought before the Assistant Commissioner in the way in which it has been presented to us. The whole circumstances, however, being looked at, it is clear that Mr. Church is entitled to vote in respect of the value of the right in question, and that the Commissioners ought to be prohibited from proceeding further with the proposed enclosure.

Rule absolute.(a)

(a) *Bovill* asked that Mr. Church might be directed to declare in prohibition, so as to give the Commissioners an opportunity of questioning whether prohibition would lie in such a case. But the Court thought the case too clear, and refused the application.

*683] *TURNER and Another, Assignees of JOSEPH JUKES, a Bankrupt, v. HARDCASTLE. Jan. 20.

A. held a lease of mines of coal and iron-stone, and carried on the business of smelting, adding to the iron ore produced from his own mines from 65 to 70 per cent. of ore which he bought elsewhere and smelted the whole into pig-iron which he sold in the market:—Held, that he was a trader within the meaning of the Bankrupt Act, 12 & 13 Vict. c. 106.

A trader, being pressed by a particular creditor, who had issued an execution against him, under which the sheriff had seized, executed an assignment of all his estate and effects for the benefit of his creditors, and in the presence of the party to whom the assignment was made, gave it to his attorney, in order that it might be used, if circumstances should render it necessary, as an act of bankruptcy, and caused notice to be given to the execution-creditor and the sheriff that "he had that day committed an act of bankruptcy":—Held, that the deed operated as a valid act of bankruptcy.

Held also, that the general form of notice was sufficient, without stating of what the act of bankruptcy consisted.

Whether the validity of the assignment as an act of bankruptcy would have been defeated if it had been shown that the petitioning creditor was aware of the circumstances under which the deed was executed,—*quære*?

A., a trader, purchased a plant and stock under an agreement to pay the purchase-money by instalments, a proper assignment to be executed when the whole of the instalments should have been duly paid, and the vendor having power, in case of default for fourteen days after notice in writing to pay the several instalments, to re-enter, and expel the purchaser, &c. Default having been made in payment of certain instalments, but the vendor not having availed himself of his power to resume possession in the manner provided by the agreement, and A., the vendee, having become bankrupt:—Held, that the assignees of A. were entitled to recover the whole value of the goods, in an action of trover against the wrongdoer.

THIS was an action against the sheriff of Denbighshire for seizing and selling the goods of Joseph Jukes under a writ of *fi. fa.* on a judgment obtained against Jukes in an action at the suit of John Henry Barber and William Henry Ellis.

The declaration contained a count in trover and a count for money had and received and on an account stated. The defendant pleaded, amongst other pleas, a denial that the plaintiffs were assignees and that the goods were the goods of the plaintiffs as such assignees; and he gave notice of his intention to dispute the trading, the act of bankruptcy, and the petitioning creditor's debt.

The cause was tried before Erle, C. J., at the sittings in London after last Trinity Term, when the following facts appeared in evidence:—Some time prior to the year 1859, a trading company called The Ponkey Iron Company, Limited, who carried on the business of *684] iron-smelting at Ruabon, in Denbighshire, mortgaged their works and the lease of certain mines there to one Michael Cooke for 9600*l.* Michael Cooke's interest in this mortgage afterwards by assignment became vested in one Robert Cooke. On the 8th of September, 1859, Robert Cooke, under the power of sale contained in the mortgage-deed, and with the consent of the Company, sold all the property comprised in the mortgage to one Joseph Jukes (who had acted as manager for the company), Jukes at the same time covenanting to indemnify the Company, and the latter assigning to Jukes the stock of iron and other materials on the works which were not comprised in the mortgage. By the terms of the agreement of the 8th of September, 1859, between Robert Cooke and Jukes, 5400*l.* of the purchase-money (7000*l.*) for the mines and plant was to be paid by certain instalments; and it was stipulated, that, when the whole

of the purchase-money and interest had been paid, Robert Cooke should execute to Joseph Jukes an assignment of all his interest in the property; but that, in case default should be made in payment of any of the instalments, and notice in writing should be given by Robert Cooke requiring payment, and further default should be made for fourteen days after such notice, it should be lawful for Robert Cooke, without any previous demand of possession of the premises, to re-enter the same, and the said Joseph Jukes and all other persons therefrom to expel, as effectually as any sheriff might do in case the said Robert Cooke had obtained a judgment in ejectment for recovering possession thereof.

After the purchase, Joseph Jukes carried on the business of smelting at the works in question upon his own account, raising ore from the mines, which he mixed with ore obtained from Northamptonshire and converted into pig-iron and sold,—the proportion of *foreign ore which he purchased being about 65 or 70 per cent. [*685 to about 30 to 35 per cent. of ore produced from his own mines. The object of so mixing the ores was to improve the quality of the iron and make it more marketable.

The act of bankruptcy upon which the plaintiffs relied, was, the execution by Joseph Jukes on the 4th of July, 1860, of a deed whereby he professed to assign all his estate and effects to his son William Henry Jukes, in trust for the benefit of all his creditors. The circumstances under which this deed was executed were as follows:—Joseph Jukes was largely indebted to Messrs. Barber & Ellis, who had obtained a judgment and had issued a fi. fa. and had delivered it to the sheriff with an endorsement to levy 260*l.* 4*s.* Under this writ the sheriff seized Joseph Jukes's property on the 27th of June, 1860. At this time a negotiation which had been pending between Joseph Jukes and Messrs. Barber & Ellis for a partnership was broken off. On the 4th of July, Joseph Jukes, accompanied by his son William Henry Jukes (to whom the father was indebted in a considerable sum for wages and for money lent), went to Liverpool to consult his attorney, Mr. Evans, as to the best course to be pursued to prevent Barber & Ellis's execution sweeping away the whole of his property. He there saw Mr. Evans, who advised an act of bankruptcy; and ultimately it was arranged that Joseph Jukes should execute an assignment, which Mr. Evans at once prepared, whereby all his estate and effects were conveyed to William Henry Jukes in trust for all the creditors: and on the following day Messrs. Barber & Ellis and the defendant (the sheriff) were severally served with the following notice:—

“Take notice that Joseph Jukes, of Ruabon, in the county of Denbigh, has this day committed an *act of bankruptcy. Dated [*686 this 4th day of July, 1860. “EVANS, SON, & SANDY,

“Solicitors for the said Joseph Jukes.”

Mr. Evans, who was called as a witness at the trial, stated, that, at the time this deed of assignment was prepared, hopes were entertained that arrangements might still be made to avoid bankruptcy; that he (Evans) at first thought of getting Jukes to file a declaration of insolvency, but, after consideration, he suggested the execution of a deed of assignment, in preference, as he did not wish to have a general

act of bankruptcy of which any one could have taken advantage, and that it was not intended that the deed should be used as an act of bankruptcy unless circumstances should render it necessary, but that the estate should, if requisite, be administered and the affairs wound up under the deed.

On the 6th of July, Barber & Ellis took from the sheriff an assignment of the greater part of the property seized, for the amount endorsed on the writ. They kept the sheriff's officer in possession, and caused the property so assigned to them to be sold by public auction on the 17th, 18th, and 20th.

On the 14th of July, Joseph Jukes was adjudicated bankrupt as an iron master, on the petition of his son, Arthur Jukes, who was also a creditor of his father. The act of bankruptcy upon which the adjudication proceeded, was, a *declaration of insolvency*,—there being no time to get the deed of assignment stamped.

Arthur Jukes swore at the trial that he was not privy to the assignment to his brother, and that he himself did not go to Liverpool until he went there for the purpose of making his father a bankrupt.

After the assignment from the sheriff to Barber & Ellis, but before *687] the property was sold, Robert Cooke, *the assignee of the mortgage, gave notice to all the parties of his claim under the deed of the 8th of September, 1859, default having been made in payment of several of the instalments, and a considerable portion of the purchase-money remaining unpaid.

On the part of the defendant, it was objected that there was no evidence of any trading, nor of any act of bankruptcy prior to the 6th of July, 1860, the date of the assignment to Barber & Ellis,—that there was no sufficient notice of an act of bankruptcy,—and that, with the exception of the movable articles, the legal interest in the mines, plant, and machinery was in Robert Cooke, and not in the plaintiffs as assignees under the fiat.

Reliance was also placed upon a letter of the 9th of April, 1860, whereby the bankrupt had agreed to assign all his interest in the property to Barber & Ellis: but this the bankrupt stated formed part of the negotiation for the proposed partnership.

A verdict was taken for the plaintiffs for 2604*l.* 4*s.*, leave being reserved to the defendant to move to enter a verdict for him, or reduce the damages to 750*l.*, the agreed value of the movable articles.

Knowles, Q. C., accordingly, in Michaelmas Term last, obtained a rule nisi to enter a verdict for the defendant, or to reduce the damages to 750*l.*; or for a new trial, on the grounds,—first, that there was no proof of trading by the bankrupt,—secondly, that the assignment of the 4th of July, 1860, was not an act of bankruptcy,—thirdly, that the petitioning creditor Arthur Jukes must be taken to have been privy and assenting to the assignment of the 4th of July,—fourthly, that there was no sufficient notice of the act of bankruptcy,—fifthly, that the property seized had been charged by the bankrupt to Barber & Ellis,—sixthly, that the property seized, except to the value of 750*l.*, *688] *was in Cooke. He referred to *Port v. Turton*, 2 Wils. 169, *Sutton v. Weeley*, 7 East 442, *Dutton v. Morrison*, 17 Ves. 193, 1 Rose 213, *Heane v. Rogers*, 9 B. & C. 577 (E. C. L. R. vol. 17), 4 M. & R. 486, *Marshall v. Barkworth*, 4 B. & Ad. 508 (E. C. L. R. vol. 24),

1 N. & M. 279 (E. C. L. R. vol. 28), *Bowker v. Burdekin*, 11 M. & W. 128,† and *Hope v. Meek*, 10 Exch. 829.†

Macaulay, Q. C., and *Quain* showed cause.—1. The bankrupt clearly was a trader. The cases which have decided that a man does not become a trader by merely preparing for the market and selling the produce of his own land, even though he purchase goods to be used therewith, the goods so bought by him being merely subordinate to the rendering his own produce available, have no application to the present case. Here, the bankrupt, who was formerly manager of the Ponkey Iron Company, which was a trading Company, having succeeded to the business, continued to carry it on as they had done. Ore from Northamptonshire was purchased by him and smelted in combination with the ore from his own mines, in the proportion of about 65 to 70 per cent. of the former to 30 or 35 per cent. of the latter. To bring him within the exemption, he must be substantially the manufacturer of the produce of his own land, whether it be clay or coal or iron-stone. Thus, in *Port v. Turton*, 2 Wils. 169, it was held that one who buys a coal-mine, and sells the coals, is not a trader within the statutes of bankrupt. "The buying and selling," says Pratt, C. J., "which is within those statutes, is to be confined to persons who live by a credit gained on an uncertain capital stock." Serjt. Davy in the course of the argument there refers to a case in which he says that, on December 19, 1707, "Lord Cowper determined that a buyer of coals in the mine is not a trader within the statutes of bankrupt; but, if he sells them again with others that he bought at market, then he becomes a trader within *the statutes of bankrupt." In Ex parte Harrison, 1 Bro. C. C. 173, 178, where the question was [*689 whether a man who made bricks from his own land and sold them was a trader, Lord Thurlow says: "The case of *Watkins v. Caddel* (B. R. 14 Dec. 19 G. 3) is only a dictum, since there the bankrupt bought iron. The case of the iron-master would be like that of the sugar-baker, who had the plantation. I should think, if it was brought to a neat question, and the jury thought he only meant to bring his own produce to perfection, they would be right not to find him a bankrupt; but it would be very difficult to bring that idea before a jury, and the question would be whether the man meant to carry on a trade, or merely to meliorate the produce of his own estate." Can it be said that this man was buying the large proportion of foreign ore for the mere purpose of meliorating the produce of his own mines? Is he not substantially a buyer of the raw material of the article he vends? [WILLIAMS, J.—If he smelted what he bought, and sold the produce, he clearly would be a trader. Is he less a trader because he adds to it some ore which is raised from his own land?] That is the proper test. In *Wells v. Parker*, 1 T. R. 34, it is laid down, that, if a man exercise a manufacture from the produce of his own land, as a *necessary or usual mode of enjoying that produce*, he shall not be considered as a trader, though he buy necessary ingredients to fit it for the market; but, where the produce of the land is merely *the raw material of a manufacture, and the manufacture not the necessary mode of enjoying the land*, there he is a trader. The cases upon which the main reliance will be placed on the other side, are, *Sutton v. Weeley*, 7 East 442, and *Heane v. Rogers*, 9 B. & C. 577 (E. C. L. R. vol. 17), 4 M. &

R. 486. In the former it was held that a devisee for life of an estate, part of which was a brick-ground, making bricks for sale there generally, with a view to profit, is not a *trader within the bankrupt laws, though he purchased the coals and some of the wood used in burning the bricks, and had occupied the same ground as a brickmaker for general sale before the same came to him by devise; for, this was but a more beneficial mode of enjoying his own estate, by carrying the soil to market in an ameliorated state, and was not a buying of any commodity to sell it again; nor did it fall within the principle of the bankrupt laws, which were levelled against those who, getting other men's goods into their hands, obtain credit upon and consume the same. And in the latter, the plaintiff, about two years before the issuing of the commission, had entered into an agreement for the purchase of five acres of land; one of the terms of the agreement being that 4s. for every 1000 bricks made on the land should be paid to the vendor, in part of the purchase-money. The plaintiff made bricks from the clay dug from the land. During part of the time he was in partnership with two others, who had no legal or equitable interest in the land, but that partnership had been dissolved before the issuing of the commission: and it was held that the plaintiff was not a person liable to the bankrupt laws, within the meaning of the 6 G. 4, c. 16, s. 2. In *Sutton v. Weeley*, Lord Ellenborough draws a distinction between the case in hand and *Ex parte Harrison and Wells v. Parker*. "This case," he says, "is, as was contended by the defendants' counsel in his argument, distinguishable from the case of *Ex parte Harrison*, where a brickmaker, having taken earth from the waste, and having made a compensation on that account to the lord, was found by the jury to be a trader; and from that of *Wells v. Parker*, in which the opinions of the King's Bench and Common Pleas differed, and on which in the House of Lords there was ultimately no decision; inasmuch as in both those cases the earth employed in making bricks was acquired for that very *purpose: and it is not necessary to say what would be our opinion if a case similarly circumstanced to the one or the other should come before us. In the present case *Weeley*, by devise, took a freehold interest in the brick-earth, and can in no way be considered as buying anything which he sold again; but, like a burner of his own chalk or rock into lime, *the smelter from his own mines of iron or lead ores into pigs*, or the manufacturer of his own rock into alum, appears to have merely carried his own soil to market in some way manufactured." And Bayley, J., in delivering the judgment of the Court in *Heane v. Rogers*, referring to the earlier Bankrupt Acts, says: "Under these Acts of Parliament, a series of cases ending with *Ex parte Gallimore*, 2 Rose, B. C. 424, established the rule, that, if a person make bricks on his own estate, and sell them as a mode of enjoying the profits of real estate, he is no trader, and it makes no difference whether he is a freeholder or termor; if he uses this business to make a profit of the soil, which he has as his own, whatever his interest in that soil be, he does not make profit, or, in the language of the statute, 'seek his living' by buying and selling; and therefore he is not liable to the bankrupt laws in that character. But, where brick-making is carried on substantially and independently as a trade, he would be

liable; that is, if a man buy the brick-earth as a chattel (and, perhaps, if he bought the brick-earth only to be consumed by himself, it might be considered as the purchase of a chattel), and, purchasing the other necessary materials, sells the bricks made with that earth, he is a trader; for, he is a person seeking his living by buying and selling goods." The distinction laid down by Lord Eldon in *Ex parte Gallimore*, is, that a man, whether termor or freeholder, who sells bricks made from the produce of his soil, is not a trader, within the bankrupt laws; but he is, if he purchases the materials *of his [692] manufacture. *Crawshay v. Maule*, 1 Swanst. 495, has an important bearing on this case. There, R. C., being in possession of mines and iron-works held under leases of unequal duration, by his will bequeathed 25,000*l.* to B., "as capital for him to become a partner with my executor of one fourth share in the trade of all those works, so long as the lease endures," with a devise to H. and his wife of the residue of his estates, real and personal: by a codicil the testator gave to W. C. three-eighths of the concern at the iron-works, "so the partnership will stand at my decease, W. C. three-eighths, H. three-eighths, B. two-eighths:" after the testator's death, W. C., H., and B. carried on the works for two years, selling iron manufactured not only from the produce of their mines, but from ore and old iron purchased for the purpose of manufacture and resale: B. having then assigned his share to C., the business was carried on in like manner by C. and H. till the death of the latter: and it was held, that the concern was not a mere joint interest in land, but a partnership in trade. [ERLE, C. J.—Does it appear what was the proportion of ore and old iron purchased there?] No.(a) By the assignment from *the Ponkey Iron [693] Company to Michael Cooke, of the 17th of November, 1858, it is plain that the interest conveyed was merely a license to dig the iron-stone, &c., at royalties.

2. It is said that the deed of the 4th of July, 1860, was not under the circumstances stated in Mr. Evans's evidence an act of bankruptcy; for that it was not delivered unconditionally, but rather as an escrow: and much reliance is placed upon the case of *Bowker v. Burdekin*, 11 M. & W. 128.† All that that case, however, decides, is, that it is not necessary that there should be express words used to denote a delivery of a deed as an escrow; but that such conditional delivery may be established by circumstances. The circumstances connected with the execution and delivery of this deed were in substance these:—Barber

(a) The affidavit of Mr. Crawshay (see 1 Swanst. 524), in explanation of the nature of the business, stated "that the produce of the mines consisted of iron-stone, coal, and limestone; and that, at the works, large quantities of iron (of various specified descriptions) had been and were manufactured, sometimes from the materials obtained from the leasehold premises in question, and sometimes from pig-iron and finers' metal purchased in London, Plymouth, and Bristol; and that, from the establishment of the works, the proprietors had been in the habit of making *very considerable* purchases of iron ore from Lancashire, pig-iron, and finers' metal, and of old wrought iron, naval and ordnance stores, for the purpose of manufacturing the same at the works into various sorts of iron, and reselling them in that manufactured state; that such purchases (to a large amount), manufacture, and resale had been made by the successive firms of Crawshay, Hall & Bailey, and Crawshay & Hall, during their respective partnerships: and that the whole of such purchases were made with view to profit, by manufacturing the same at the works into bar and other iron for resale, and not merely for mixing the same with the iron the produce of the works for the purpose of improving the iron of the works, or bringing the same better to market."

& Ellis had a judgment against the bankrupt. Negotiations had been going on between them for a partnership, which were broken off, and to the bankrupt's surprise an execution was put into his premises at the suit of Barber & Ellis on the 27th of June. On the 4th of July, the bankrupt consulted his attorney, Mr. Evans, who, finding that the sheriff was making preparations to sell, recommended him to commit an act of bankruptcy,—the object being to do something which would effectually defeat the execution and stop the sale. Accordingly the deed was drawn up and executed, and left in the hands of Mr. Evans, *694] to be made use of *as circumstances might render necessary: and on the same day a general notice was given that an act of bankruptcy had been committed. That the act of bankruptcy was concerted is no objection; 12 & 13 Vict. c. 106, s. 115.(a) [ERLE, C. J.—Does the thing become invalid as a deed because it was not intended to be acted upon?] Clearly not. [WILLIAMS, J.—The primary object of the deed was that it should operate instantaneously. I do not see how it can be an escrow. ERLE, C. J.—The bankrupt never meant that it should take effect as an assignment, if the notice to the execution-creditors and to the sheriff had the effect of stopping the sale. It was not stamped until afterwards.] How can the rights of the creditors to rely upon this deed as an act of bankruptcy be affected by an arrangement between the bankrupt and his attorney that the transaction should be concealed and be only brought to light in a given event? The definition of an “escrow” is thus given in Sheppard's Touchstone, p. 58,—“The delivery of a deed [writing] as an escrow is said to be where one doth make and seal a deed [writing] and deliver it unto a stranger until certain conditions be performed, and then to be delivered to him to whom the deed [writing or grant] is made, to take effect as his deed. And so a man may deliver a deed, and such a delivery is good. But in this case two cautions must be heeded. 1. That the form of words used in the delivery of a deed in this manner be apt and proper. 2. That the deed be delivered to one that is a stranger to it, and not to the party himself to whom it is made. The words, therefore, that are used in the delivery must be after this manner: I deliver this [writing] to you as an escrow *695] *[namely, scriptum, a mere writing; thus negating the application to the terms of a perfect deed], to deliver [it] to the party as my deed, upon condition that he do deliver to you 20*l.* for me, or upon condition that he deliver up the old bond he hath of mine for the same money, or as the case is. Or else it must be thus: I deliver this as an escrow to you, to keep until such a day, &c., upon condition that if before this day he to whom the escrow is made shall pay to me 10*l.*, or give to me a horse, or infeoff me of the manor of Dale, or perform any other condition, that then you shall deliver this escrow to him as my deed. For, if, when I shall deliver the deed to the stranger, I shall use these or the like words: I deliver this to you as my deed, and that you shall deliver it to the party upon certain conditions: or, I deliver this to you as my deed, to deliver to him to whom it is made when he comes to London: in these cases the deed doth take effect presently [because the party hath made the writing

(a) It was otherwise formerly: see *Marshall v. Barkworth*, 4 B. & Ad. 508 (E. C. L. R. vol. 24).

his deed by the mode of delivery; for, as he has delivered the writing as his deed, the writing shall have that effect], and the party is not bound to perform any of the conditions [and its operation cannot be defeated or suspended by reason of the conditions; but equity will relieve if the conditions be not performed.] So it must be delivered to a stranger: for, if I seal my deed and deliver it to the party himself to whom it is made, as an escrow, upon certain conditions, &c., in this case, let the form of the words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently, and [in reference to the legal operation of the deed], the party is not bound to perform the conditions; for, in *traditionibus chartarum, non quod dictum sed quod factum est inspicitur.*" To whom was this deed given? The father and son went together to the attorney's office: *the assignment was prepared and executed and handed to the attorney, to be used by him as the attorney of the son, as cir. [*696 circumstances might render it necessary. In *Doe d. Garnons v. Knight*, 5 B. & C. 671 (E. C. L. R. vol. 11), 8 D. & R. 348 (E. C. L. R. vol. 16), it was held that delivery to a third person for the use of the party in whose favour a deed is executed, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery, although the person to whom the deed is so delivered be not the agent of the party for whose benefit the deed is made. That was followed by *Grugeon v. Gerrard*, 4 Y. & C. 119,† where A., being indebted to his bankers, executed a deed purporting to be a mortgage to them for securing the debt: after executing it, he delivered it to his attorney, who retained it in his possession till A.'s bankruptcy, which occurred about a month afterwards: the attorney then delivered it to the mortgagees: and it was held that this was a good delivery by A. to the mortgagees. In *Jeffries v. Alexander*, 31 L. J., Chan. 9, A. executed a deed, by which, reciting that he was desirous of founding certain charities, he covenanted with certain persons therein named, in his lifetime and within twelve calendar months, to invest 60,000*l.* in the names of the covenantees, or that his executors should, without prejudice to his debts and the legacies to be given by his will, do so within twelve months after his death. The deed then declared the charitable trusts. A. executed another deed of similar import. On the same day he made his will. He never communicated to anybody the existence of these deeds, but kept them till the day of his death in his own bureau. When he believed himself to be dying, he said where a paper parcel was to be found which contained his will. The parcel was found: it contained the two deeds and the will, together with a memorandum explaining the *true object of the deeds, and [*697 directing two individuals specially named to be placed on the funds of the charity. His property almost entirely consisted of chattels real. It was held that the indenture was a deed, and not a testamentary disposition; but that it was a deed affecting his assets, and that, as these assets were chattels real, it could not be carried into effect, being void under the Mortmain Act.

8. Then it is said that the petitioning creditor, Arthur Jukes, must be taken to have been privy and assenting to the assignment of the 4th of July, 1860, and therefore no act of bankruptcy could be

founded upon it. [ERLE, C. J.—There was no evidence that Arthur Jukes had any knowledge of the assignment.]

4. The next objection is that there was no sufficient notice of the act of bankruptcy. In *Udal v. Walton*, 14 M. & W. 254,† it was held that a notice by a bankrupt to an execution-creditor, that “he had committed several acts of bankruptcy,” was a sufficient notice of a prior act of bankruptcy, within the 2 & 3 Vict. c. 29; and that the notice need not state the nature or particulars of any act of bankruptcy.(a) [ERLE, C. J.—We must leave this point to be disposed of by the Court of error.]

5. Then it is said that the property seized had been charged by the bankrupt to Barber & Ellis. That supposed charge is by the bankrupt's letter of the 29th of April. 1860, which it is said was an engagement to assign which a Court of equity would enforce. That letter, however, according to the bankrupt's evidence, was written as part of the arrangement for the proposed partnership.

*698] 6. As to the reduction of damages. The agreed *value of the property conveyed by the bill of sale by the sheriff to Barber & Ellis, the execution-creditors, was 260*l.* 4*s.*; of that, goods to the value of 750*l.* were put upon the premises by the bankrupt, and it is sought to reduce the damages to that amount, on the ground that the property in the effects comprised in the agreement of the 8th of September, 1859, belonged to Cooke. The sheriff, however, has no right to set up a title which Cooke himself does not set up. The bankrupt was in the lawful possession of the property, with the assent of Cooke, in the character of purchaser. Until default in payment of the instalments, and a demand in writing, and default for fourteen days after such demand, Cooke could not have resumed possession. [KEATING, J., referred to *Leake v. Loveday*, 4 M. & G. 972 (E. C. L. R. vol. 43), 5 Scott N. R. 908. There, A., in 1837, bought goods of B., and allowed B. to remain in possession of them up to 1839, when B. became bankrupt: B.'s assignees made no claim, and B. retained possession of the goods till 1841, when the sheriff under a *fi. fa.* against B. seized and sold them: after the sale, B.'s assignees gave notice of their claim to the sheriff, who, upon receiving an indemnity, handed over the proceeds to them: in trover by A. against the sheriff, it was held, that, under the plea of not possessed, the sheriff might set up the title of the assignees. WILLES, J.—*Brierly v. Kendall*, 17 Q. B. 937 (E. C. L. R. vol. 79), is a very important case. By indenture of sale, A. assigned all his household goods, &c., to secure a debt due from him to the assignees, subject to a proviso that the deed should become void upon payment of the said sum on a certain day, or on some earlier day to be appointed by the assignees by notice in writing, to be served on A. twenty four hours before the day of payment so appointed: interest to be paid in the mean time. It was also agreed by *699] the deed, that, after *default made in payment contrary to the said proviso, it should be lawful for the assignees to enter and take possession of the goods, and to sell them and reimburse themselves out of the proceeds, accounting to A. for any surplus; and that, until such default, it should be lawful for A. to hold, use, and possess

(a) See *Conway v. Nall*, 1 C. B. 643 (E. C. L. R. vol. 50), *Pennell v. Stephens*, 7 C. B. 957 (E. C. L. R. vol. 62), and *Hope v. Meek*, 10 Exch. 829.†

the said goods, without hindrance from the assignees. The assignees served A. with a notice to pay on a day earlier than that named in the deed, and afterwards entered and took and sold the goods assigned: but the notice was bad, having been served less than twenty-four hours before the day of payment appointed by the assignees. It was held that A. had, under the deed, the right of possession of the goods, defeasible only by default in payment after due notice; and that he might therefore sue the assignees in trespass for having wrongfully entered and sold; and that, in such action, the measure of damages should be, not the value of the goods, but the value of the plaintiff's interest in them at the time of the trespass. Lord Campbell there says: "The mortgagee could not bring trespass or trover; the mortgagor therefore could; and that either against a third party who was a wrongdoer, or against the mortgagee if he became a wrongdoer by entering without having given the proper notice. I have as little doubt that the value of the goods is not the proper measure of damages. If the action had been against a third party, the case would have been different: but here it would be manifestly unjust to adopt such a test.]

Knowles, Q. C., and T. Jones, in support of the rule.—1. It is unnecessary to go into any very minute examination of the cases: the true result of them all is, that one who manufactures and sells the produce of his own land, does not thereby become a trader within *the [*700 meaning of the bankrupt laws, even though he purchases other articles to mix therewith in order to complete the manufacture or meliorate the article produced. In none of the cases is any point made of the proportion which the purchased article bears to the produce of the party's own land: it is enough if the foreign article is bought for the purpose of using the produce of the land more advantageously. "The person," says Pratt, C. J., in *Port v. Turton*, 2 Wils. 169, "who shall be deemed a bankrupt is thus described, viz. first, he must be a person using trade of merchandise, &c.; or, secondly, one seeking his living by buying and selling. By buying and selling what? Surely not by buying an interest in land, and selling the profits thereof: this can never come within the idea of using the trade of merchandise, or getting a living by buying and selling, in the sense of the legislature. From the idea we have of merchandise, the line may be drawn between the landowner and the merchant. One would wonder there could ever have been any doubt about a farmer; for, if every buyer and seller was liable to be a bankrupt, many of the first persons in the kingdom might be liable to be so. Whatever the owner of the land in fee may do, surely he who rents it may do the same: if the former may be a buyer and seller, and not be liable to be a bankrupt, why may not the farmer be so also? His tilling the land, husbandry and stock on his farm, are known to everybody, yet he seeks his living by buying and selling: so, an innkeeper, a victualler, and an alehouse-keeper, get their living by buying and selling; but their way of buying and selling is not within the meaning of any of the statutes of bankrupt: the buying and selling which is within those statutes is to be confined to persons who live by a credit gained on an uncertain capital stock." [KEATING, J.—Was it shown *that [*701 the ore raised from the mines in question would not if smelted

by itself make a merchantable commodity?] There was no such evidence: but it is well known that it is what every smelter of iron ore does. This is apparent from the case of *Crawshay v. Maule*, 1 Swanst. 495. The question is whether the purchase of the foreign article was subservient to the purpose of making the produce of the land more valuable: *Ex parte Harrison*, 1 Bro. C. C. 173. In *Heane v. Rogers*, 9 B. & C. 577 (E. C. L. R. vol. 17), 4 M. & R. 486, where one who manufactured bricks from clay dug from his own land was held not to be a trader within the meaning of the bankrupt laws, Bayley, J., in delivering the judgment of the Court, says: "Under the old Acts of Parliament, the plaintiff would not have been a trader; nor is he under the new Act of Parliament 6 G. 4, c. 16, as a person 'seeking his living by buying and selling.' But this statute has additional words, including those 'who seek their living by the workmanship of goods or commodities:' but the case of *Ex parte Burgess*, 2 Glyn & J. 183, has decided that they do not include a person making bricks on his own estate: these words appear to have been introduced to meet the case of persons who do not buy and sell, and yet have other men's goods intrusted to them (so as to bring them within the principle of the bankrupt laws), such as bleachers and fullers, lace-makers, and stocking-makers, who make for others, and the like; but do not include those who use workmanship on goods as part of the profits of land, such as farmers making cheese or cider, alum-makers, &c.; and we concur with the judgment of the present Lord Chancellor in that case, and therefore are of opinion that the plaintiff was not a trader." So, in *Ex parte Atkinson*, 1 Mont. D. & De Gex 300, A., in conjunction with T., took a lease of certain salt-works and brine-pits, *702] for the purpose of *manufacturing and selling salt, which was made by them chiefly from the springs and rock-salt upon the premises demised, but some of the brine they obtained by channels from adjoining premises; and it was held that this was not a trading, as a "workmanship of goods and commodities," within the meaning of the 6 G. 4, c. 16, s. 2.

2. The circumstances under which the assignment of the 4th of July, 1860, was executed clearly preclude it from operating as an act of bankruptcy. In all the modern cases, it has been held, that, where the circumstances attending the execution of a deed are such that there was no intention that the delivery should be complete, the deed will have no immediate operation. Thus, in *Bowker v. Burdekin*, 11 M. & W. 128,† it was held that it is not necessary that the delivery of a deed as an escrow should be by express words: if from the circumstances attending its execution it can be inferred that it was delivered not to take effect as a deed until a certain condition was performed, it will operate as a delivery as an escrow only. See the position of the parties here. Barber & Ellis had seized. The bankrupt was anxious to renew the negotiations for a partnership: and this deed was resorted to as a device to prevent their execution from sweeping away all the property,—to be used or not, as circumstances might make it convenient. If the delivery had been complete, any creditor might have done what Mr. Evans said was intended not to be done. The suggestion made on the part of the plaintiffs would evi-

dently have defeated that intention. They were anxious to avoid a bankruptcy.

3. It must be conceded that there was no direct evidence that Arthur Jukes, the petitioning creditor, took any active part in procuring the execution of the assignment: but it is impossible to look at the evidence *without seeing that the bankrupt's two sons [*703 were mere puppets in the hands of the attorney, to carry out the scheme concocted by him. They were both in the bankrupt's employ at weekly wages. When William Henry Jukes went with his father to Liverpool, he did not know what he was going for. And it is equally clear, that, when Arthur Jukes applied for the adjudication of bankruptcy, he was acting by the instructions and under the influence of his father.

4. No doubt there are cases which show that a general notice that an act of bankruptcy has been committed is sufficient. But in *Hope v. Meek*, 10 Exch. 829, 845,† the notice was not so general as it was here: and Parke, B., in delivering the judgment of the Court, expresses himself in a very guarded manner. "Where," he says, "an act of bankruptcy has been in fact committed, any communication which brings to the knowledge of the execution-creditor before the sale the alleged fact that an act of bankruptcy has been committed, *in a way which ought to induce him as a reasonable man to believe that the notification was true*, is in our judgment a sufficient notice." [ERLE, C. J.—We must decide this point in accordance with the current of the authorities.]

5. The letter of the 9th of April, 1860, amounts to an equitable assignment of all the plant to Barber & Ellis, which they might have enforced in equity. [ERLE, C. J.—The strong probability is, that that was written, as the bankrupt suggested, as part of the contemplated arrangement for a partnership. At all events, if Barber & Ellis had looked upon it as an equitable assignment, there was no necessity for their afterwards resorting to the *fi. fa.* If it had been intended to rely upon this at the trial, the question should have been submitted to the jury.] The construction of that letter could hardly be a question for the jury.

*6. At all events, the plaintiffs can only be entitled to 750*l.*, [*704 the value of the coals and other things which had been brought to the premises by the bankrupt. The fixtures and machinery did not belong to the bankrupt. At the utmost, he could only have an equitable charge to the extent of the instalments of the purchase-money which he had paid: and the assignees only take what the bankrupt was equitably as well as legally entitled to: *Mogg v. Baker*, 3 M. & W. 195.†

ERLE, C. J.—With respect to all the points except that which relates to the reduction of the damages, we propose to give our judgment at once, reserving that for a few days to enable us to look into the cases. The first question is, whether the bankrupt was a trader within the meaning of the Bankrupt Act. The facts appeared to be these:—The bankrupt had a lease of certain land together with the veins of coal and iron-stone thereunder; and he carried on the business of smelting iron there, using about 30 or 35 per cent. of the ore the produce of his own land, mixed with from 65 to 70 per cent. of

Staffordshire ore which was purchased by him for the purpose of meliorating the produce of his own land, which was manufactured and sold by him as pig-iron. Taking these facts, and looking at the authorities on the subject, I incline to think that the bankrupt was a trader, one who got his living by buying and selling. As to all the large quantity which he bought, he bought it to sell again, and in respect of that he clearly was a trader. No doubt, the ore he bought was in some degree purchased for the purpose of improving the produce of his own land. His stock in trade consisted partly of his purchases and partly of the produce of his own mines. I do not think the circumstance of the *infusion of some portion of the produce of his

*705] own land with the ore he bought prevents his being a trader in respect of the goods which he so bought and sold. Take the case of a farmer, also carrying on the business of a corn-factor, buying large quantities of corn, and mixing it with the proceeds of his own farm, and selling the whole: he clearly would be a trader in respect of such dealings. I am not aware of any authority which would justify me in holding that Jukes was not a trader subject to the bankruptcy law. Then, was the deed of assignment of the 4th of July, 1860, an act of bankruptcy? It is clear that an assignment by a trader of all his stock in trade for the benefit of his creditors is an act of bankruptcy. Much discussion has taken place as to whether that deed was intended to operate as a deed at all, or was only intended so to operate in the event of a certain state of things supervening. It appears to me, however, that the facts show that it was intended to operate as an absolute deed from the beginning. There had been a negotiation for a partnership between Barber & Ellis and Jukes, which had gone off; and Barber & Ellis, who had obtained a judgment against Jukes, issued a fi. fa. thereon, the execution of which it was extremely desirable to prevent. The only course which suggested itself to the mind of Jukes's legal adviser to effect that object, was, to get up an act of bankruptcy, and to give notice of it to the sheriff, so as to prevent a sale under the execution. The intention that the deed should operate at once as a transfer or assignment was therefore of the very essence of the transaction; for it was impossible to defeat the execution, except by an act of bankruptcy prior to the sale, and notice thereof. Accordingly, on the 4th of July, 1860, the assignment from Jukes to his son was made, and notice was immediately given both to

*706] Barber & Ellis and to the sheriff *that an act of bankruptcy had been committed. Mr. Evans, Jukes's attorney, thoroughly explains what passed with reference to this deed, and what was the intention of the parties regarding it. He says: "I thought first of a declaration of insolvency, but finally decided on this deed of assignment, because I did not wish to have a general act of bankruptcy of which every one could take advantage." It was possible that Messrs. Barber & Ellis might come to terms; in which case the deed would have been kept in the office. If nobody had notice of it, all subsequent transactions would be valid, and practically that would be tolerably safe, the deed being known only to the father and the son. It seems to me that it was intended to be a perfect deed. It was in all probability meant to be used for the purpose of winding up the affairs of Jukes, if need should be. But, at all events, it would operate as

an absolute assignment of the property. It was not void because concerted between Jukes and his son; for, the statute prevents that from being an objection: nor was it void upon ordinary principles, as a colourable deed for the purpose of defeating creditors. But, as between the parties to it, it was a valid deed: it would be valid also, as to any other creditor who might choose to make use of it for the purpose of getting a division of the assets. It seems to me, therefore, that it operated as a valid act of bankruptcy. The petitioning creditor is not shown to have been privy to the execution of the deed. It appears that the bankrupt went with his son William Henry Jukes to Liverpool to consult Mr. Evans, the attorney, and nobody then knew that a deed of assignment would be resorted to. That Arthur Jukes, the petitioning creditor, was privy to the assignment, there is no evidence. Upon the whole, therefore, I think there was a valid act of bankruptcy, and that a general notice, according to *the current of the authorities, was sufficient. If any doubt be [*707 entertained on that point, the parties may take the opinion of a Court of error.

As to the remaining point, on the reduction of damages, which depends upon the rights of Cooke, I should desire time for further consideration.

WILLIAMS, J.—I am entirely of the same opinion. In the first place, I am clearly of opinion that Joseph Jukes was a trader within the bankrupt laws. Adopting the view of the facts which has been submitted to us on the part of the defendant, the result seems to be, that, in order to make the produce of his own land profitable in the greatest degree, it became necessary for the bankrupt to become a trader, by buying ore the produce of other mines, in the proportion mentioned by my Lord, to smelt with his own. He is not the less a trader because he was induced to become so in order to make the most of the produce of his own mines. Then, as to the act of bankruptcy, —again adopting the view of the facts submitted to us by the counsel for the defendant, the plan which the parties seem to have adopted, was, to be doubly armed, viz. with a declaration of insolvency and a deed to which they might resort as a complete act of bankruptcy should circumstances render it desirable. To secure that object, it was necessary that there should be a present act of bankruptcy, which could only be by giving the deed of assignment a complete and efficient operation from the time of its execution. It is true, that the effect of that would be to enable any creditor, if it were known, to avail himself of the deed, and so deprive the parties of that option. It was therefore part of the plan that the deed should be kept dark. But it was essential that the act of bankruptcy should have been perfected by the execution of the deed. The remaining points *have been disposed of by the observations of my Lord. The [*708 sufficiency of the general notice is affirmed by the authorities referred to in the course of the argument. As to the validity of the deed being affected by the fact of the petitioning creditor being a party assenting to it, the evidence disposes of that point. I do not, however, wish to be understood as admitting, that, if the facts did raise the point, it is anything like a clear one. Assuming that the petitioning creditor was a party to it, I by no means admit that the

assignees would have been precluded from setting it up as an act of bankruptcy. Without, however, giving any opinion upon that point, I must not be understood as at all sanctioning the notion that they might not so have acted upon it.

WILLES, J.—If I ought to express any opinion, without having heard the whole of the arguments, I do so in concurrence with what has been stated by my Lord Chief Justice.

KEATING, J.—I also concur with what has fallen from my Lord, and do not desire to add anything. *Cur. adv. vult.*

ERLE, C. J., now said:—The plaintiffs were entitled to the possession of the goods taken, and they had an interest in them increasing in proportion as the instalments mentioned in the mortgage-deed should be paid off till they should become owners, on assignment from Cooke when all the instalments should be paid.

The defendant is a mere wrongdoer, having no right either under Cooke, the mortgagee, or any one else. The defendant, therefore, is liable to the plaintiffs for the full value of the goods; and the plaintiffs are liable to Cooke for his proportion.

*709] *If Cooke or any one claiming under him had been sued for converting the goods, then the plaintiffs would only have been entitled to the value of their interest therein, the defendant being entitled to keep the residue. This is laid down in *Brierly v. Kendall*, 17 Q. B. 937 (E. C. L. R. vol. 79). The same rule is laid down in respect of the measure of damages in trover by a bailee against a stranger, as contradistinguished from an action against a party having an interest in the goods, in Mr. Maine's book on Damages, p. 214, where the authorities are collected.

The verdict will therefore stand for the full amount.

Rule accordingly.

PENNELL and Another, Assignees of CHEESEMAN, a Bankrupt, v. REYNOLDS. July 8, 1861.

An assignment by a trader of all his property and effects for a present advance of part of their value is not necessarily an act of bankruptcy.

It is for the jury to say whether under the circumstances the effect of the assignment is to defeat and delay creditors.

THIS was an action brought by the assignees of one Cheeseman, a bankrupt, to recover the value of certain goods of the bankrupt which had been seized by the defendant under a bill of sale executed by the bankrupt before his bankruptcy, and sold.

The cause was tried before Wightman, J., at the last Spring Assizes at Lewes, when a verdict was, under the direction of the learned Judge, entered for the plaintiffs for £297, the agreed value of the goods, subject to the opinion of the Court upon the following facts,—the Court to draw such inferences as a jury might have drawn:—

Cheeseman, the bankrupt, was a contractor. The defendant Reynolds was his surety for the performance of certain contracts, and was also under liability for him in respect of several outstanding

*accommodation acceptances, and had advanced him various sums of money. In December, 1860, Cheeseman being in want of a further advance, and having then an execution in his house, applied to Reynolds for 250*l*. The latter declined to advance the money without security; and ultimately it was arranged, that, in consideration of the present advance of that sum, and to secure the past advances and existing liabilities, Cheeseman should execute a bill of sale of the whole of his horses, carts, household furniture, &c., to Reynolds.

The bankrupt, who was called as a witness, amongst other things, stated that the bill of sale was executed not only as a security for the advance then made, and to cover the liabilities under which Reynolds then stood on his account, but also for the purpose of staving off his other creditors; his expression being,—“My object was, that, if any of my creditors molested me, Reynolds might protect me.” He, however, denied that there was any contemplation of bankruptcy at the time, but stated that he hoped to be able to go on.

The bill of sale was executed on the 8th of December, 1860, the seizure under it took place on the 9th of January, 1861, and Cheeseman was adjudicated a bankrupt on the 14th of January.

The value of the plant, &c., was about 900*l*. The gross proceeds of the sale were 515*l*, the expenses of sale and payments on account of rent, &c., amounted to 186*l*,—the balance being the sum for which the verdict was taken.

On the part of the plaintiffs, it was submitted that the execution of the bill of sale was in itself an act of bankruptcy, as being a conveyance of the whole of a trader's property for an advance of what was confessedly only a part of its value; and also that it was fraudulent and made with intent to defeat and delay the bankrupt's creditors.

**Lush*, Q. C., in Easter Term last, obtained a rule nisi to enter a verdict for the defendant, “on the ground that the evidence did not entitle the plaintiffs to recover.” [*711]

Bovill, Q. C., *G. Denman*, Q. C., and *Hannan*, showed cause.—Formerly, it was always considered that a trader who executed an assignment of the whole of his property, and thus put it out of his power to carry on his trade, thereby committed an act of bankruptcy. Subsequent cases, however, decided, that, where the assignment was for a present advance of their value, though it consisted of the whole of the party's goods, it was not an act of bankruptcy. Thus, in *Siebert v. Spooner*, 1 M. & W. 714,† Lord Abinger says: “If a man assigns the whole of his effects, not for a new consideration, but for an outstanding debt, that is an act of bankruptcy; because the very nature of the transaction prevents him from carrying on his trade.” And *Alderson*, B., says: “If an *equivalent* is given, there is only a change of the nature of the property which the party has, but not a conveying of it away.” In *Lindon v. Sharp*, 7 Scott N. R. 730, 6 M. & G. 895 (E. C. L. R. vol. 46), one M., a trader, being indebted to his bankers, and being pressed by them for security, executed a conveyance to them of certain stock and effects enumerated in a schedule annexed to the deed, with a power of sale on default in payment of 1000*l*. on demand: the deed recited that M. was indebted to the bankers in 1000*l*, but it contained no stipulation for fresh advances by them;

and, though it did not in terms purport to convey *all* M.'s property, it appeared that the agent of the bankers who negotiated the transaction was aware that M. in reality possessed no other property: M retained possession of the effects so conveyed until a few days before a fiat in *712] bankruptcy issued against him: *and it was held that the execution of this deed was an act of bankruptcy. Here, the assignment was of substantially the whole of Cheeseman's property. If the defendant had at the time advanced him the whole value, according to the more recent authorities, the execution of the deed would not have been an act of bankruptcy. But the advance being of little more than a fourth part of the value,—the rest of the consideration being the liability as surety, which is equivalent to a past advance (*Leake v. Young*, 5 Ellis & B. 955 (E. C. L. R. vol. 85)),—it clearly was an act of bankruptcy. The great authority for the distinction between an assignment for a present and an assignment for a past advance, is the case of *Graham v. Chapman*, 12 C. B. 85, which is quite in point. There, a trader, in consideration of a past debt of 240*l.* and a present advance of 200*l.*, conveyed by deed substantially the whole of his property, giving the transferee a right to seize and take all future acquired property, even though it should be purchased with the money which was alleged to be the consideration for the transfer: and it was held, that, inasmuch as the trader got no equivalent for any part of the stock transferred, and such transfer necessarily defeated and delayed his creditors, though without fraud in fact, it constituted an act of bankruptcy within the statute 12 & 13 Vict. c. 106, s. 67. If part of the consideration is a *past* advance, however *bonâ fide* the transaction may be, it is an act of bankruptcy. [BYLES, J.—That will depend very much upon the amount of the present advance. ERLE, C. J.—Suppose the property is worth 500*l.*, and the trader assigns the whole, receiving 400*l.*?] He would get no value for the 100*l.* [ERLE, C. J.—The effect of the judgment in *Graham v. Chapman* is, that the trader in reality got no advance at all. Suppose property worth 1000*l.* is assigned for 950*l.*, would that be an act *713] of *bankruptcy?] It is submitted that it would. [ERLE, C. J.—I should think not.] Here, all that the party gets for 900*l.* worth of goods is 250*l.* In *Hutton v. Cruttwell*, 1 Ellis & B. 15, 21 (E. C. L. R. vol. 72), Lord Campbell, speaking of *Graham v. Chapman*, says: "There, the deed expressly recited that it was given, not only for a further advance, but for an old unsecured debt; and Lord Chief Justice Jervis several times over points this out as the chief foundation of his judgment. He likewise remarks upon the power to take after-acquired property, which there might have prevented the trader from deriving any benefit whatever from the further advance. But that cannot apply to a case like the present, where the trader did derive the full benefit of the whole sum advanced, by its being applied at the time to satisfy the demand of an importunate creditor." In *Bittlestone v. Cooke*, 6 Ellis & B. 296 (E. C. L. R. vol. 88), the assignment was entirely for fresh advances. *Bell v. Simpson*, 2 Hurlst. & N. 410,† was the case of a sale partly for an old debt and partly for a present advance. Selling his goods is part of the ordinary business of a trader. In *Pennell v. Dawson*, 18 C. B. 355 (E. C. L. R. vol. 86), Jervis C. J., in his summing up (which the Court held to be correct)

gives an exposition of what was meant by his judgment in *Graham v. Chapman*. [WILLES, J.—*Pennell v. Dawson* went down for a new trial, and was tried before me at the sittings after Trinity Term, 1856, when there was a verdict for the defendants; and that verdict was not disturbed.] The true test is, whether the assignment tends to defeat and delay creditors, not whether it stops the trade. In *Smith v. Cannan*, 2 Ellis & B. 35, G., a farmer, conveyed all his farming stock and goods to S. by bill of sale, by way of security for about 900*l.*, with a power of sale. The property comprised in the bill of sale was of about the value of 2800*l.*, and there was a trust for G. of the surplus of *the property comprehended in the bill of sale, which was [*714 the whole of G.'s property, with the exception of two shares in a joint stock bank, of the value of 17*l.* 10*s.* each. S. seized and sold enough of the stock to pay the amount secured; and the trade of the bank was not affected by giving it. In trover by G.'s assignees against S., issues being joined on pleas of not guilty and not possessed, and the Judge at Nisi Prius having ruled that these facts were evidence on which the jury might find a verdict for the plaintiff,—it was held by the Exchequer Chamber, on a bill of exceptions, that the necessary consequence of an assignment of what is substantially all the trader's property, is, to delay his creditors, and that the existence of a resulting trust, and of a substantial surplus, does not prevent its having that effect; and that a conveyance necessarily delaying a trader's creditors is an act of bankruptcy, though it has not the effect of stopping his trade; and that a transaction, being itself an act of bankruptcy, is not protected, though made with a party who has no notice of the circumstances making it an act of bankruptcy; and consequently that the facts in that case were evidence on which the jury might find for the plaintiffs, and the direction was therefore right. [BYLES, J.—For anything that appears on the notes in this case, the 250*l.* would be enough to satisfy the whole of Cheeseman's creditors.] This subject is very elaborately discussed in a very able judgment delivered by Mr. Commissioner Hill in the Court of Bankruptcy at Bristol in a case of *Ex parte Cottrell*, 1 Law Times N. S. 465. There, the alleged bankrupt, being indebted to his brother-in-law in the sum of 500*l.*, asked for a second loan to the same amount, which was granted upon the security of a bill of sale executed on the 1st of December, 1859, and given to secure 100*l.* By this instrument the alleged bankrupt assigned all *his property to the creditor, with the exception of certain [*715 horns of the value of about 15*l.*, and his book-debts of the value of 2*l.* or 3*l.*; the property assigned amounting, according to the estimate of the alleged bankrupt himself, to the value of 400*l.* The assignment was upon trust, that, in case of default made in payment of the said sum of 100*l.* and interest on demand in writing, the creditor might immediately take possession and make sale of the property assigned, and, after payment of his debt, with interest and expenses, should pay over the surplus to the assignor. On the 20th of December, the creditor took possession under the bill of sale. The learned Commissioner, in giving judgment, says: "I find no ground for impeaching the bill of sale as fraudulent in fact. On the contrary, it appears to me that both parties contemplated at the time that the advance would enable the trader to continue his trading. But the

more difficult question of fraud by intendment of law remains to be considered. The 67th section of the Bankrupt Law Consolidation Act, 1849, declares that a trader making a deed with intent to defeat or delay his creditors shall be deemed to have thereby committed an act of bankruptcy,—a provision of long standing, drawn from prior Acts of Parliament. As the law holds every man to have intended the necessary and even the natural consequences of his own act, a trader will be held to have intended to defeat or delay his creditors, whatever may have been the actual state of his mind on the subject, if the deed which he has executed leads naturally to such a consequence. * * * The case of *Graham v. Chapman*, 12 C. B. 85 (E. C. L. R. vol. 74), establishes the doctrine that the assignment of a trader's whole, or what is substantially the whole of his property, though for a good consideration, is an act of bankruptcy, if an antecedent debt form any portion of such consideration. *I state *716] that *Graham v. Chapin* established this doctrine, on the authority of *Hutton v. Cruttwell*, 1 Ellis & B. 15 (E. C. L. R. vol. 72), where Lord Campbell, in delivering the judgment of the Court of Queen's Bench, said,—‘We are referred to *Graham v. Chapman* as an authority to prove that a clause authorizing the assignee in a bill of sale to enter and sell after-acquired property is necessarily an act of bankruptcy. On referring to the case we do not find any such doctrine laid down in it. There, the deed expressly recited that it was given, not only for a further advance, but for an old unsecured debt, and Jervis, C. J., several times over points this out as the chief foundation of his judgment.’ Unless, then, these cases must be taken to have been overruled, the execution of this deed was clearly an act of bankruptcy.” He then proceeds to observe upon *Young v. Waud*, 8 Exch. 221,† *Hale v. Allnutt*, 18 C. B. 505 (E. C. L. R. vol. 86), *Bittlestone v. Cooke*, 6 Ellis & B. 296 (E. C. L. R. vol. 88), and *Bell v. Simpson*, 2 Hurlst. & N. 410;† and concludes by saying: “It is with no slight diffidence that I select my guide among these conflicting decisions. But, the selection being forced upon me, I adhere to the doctrine, that, *where, as in this case, part of the consideration consists of an antecedent debt, the assignor does not receive an equivalent for the assignment, and consequently that the act of bankruptcy is proved.*” The conclusion drawn in that case from the conflicting authorities is, it is submitted, manifestly the correct one.

Lush, Q. C., Thompson Chitty, and Lumley Smith, in support of the rule.—If the bill of sale be given for present or future advances, *Hutton v. Cruttwell*, 1 Ellis & B. 15 (E. C. L. R. vol. 72), and *Bittlestone v. Cooke*, 6 Ellis & B. 296 (E. C. L. R. vol. 88), show that it is good. The question, then, is, did Cheeseman receive an equivalent for the assignment? He received 250*l.*, which, under his then circumstances, was a material assistance to him, and was obviously *717] *advanced for the purpose of enabling him to go on. At the time the assignment was given, it was a security only for the 250*l.* then advanced. Until some further payment should be made by Reynolds in respect of the liabilities he was under on Cheeseman's account, the latter might at any time have discharged his liability under the deed by repaying the 250*l.* and interest. The case is, therefore, altogether distinguishable from *Leake v. Young*, 5 Ellis & B. 955 (E. C.

L. R. vol. 85), where the assignment was made solely in consideration of existing liabilities, and from *Graham v. Chapman*, where the deed was given in consideration of a pre-existing debt as well as of a present advance. [WILLIAMS, J.—If the deed is given as a security for a liability from which a debt may accrue, I must confess I do not see why it the less operates to defeat and delay creditors, than if it were a security for a past debt.] In *Bittlestone v. Cooke*, 6 Ellis & B. 296 (E. C. L. R. vol. 88), B., a trader, by bill of sale conveyed all his stock, and all the stock that should during the continuance of the security become his, with a power of sale, to C., as a security for money to be advanced by C. The bill of sale was drawn up as a security for an existing debt as well as for fresh advances; but this was a mistake, the whole consideration being fresh advances not to exceed a certain sum. C. made the advances; the property in fact was about three times the value of the advances. B. was at this time in reality insolvent; but the Court (which had power to draw inferences of fact) drew the inference that the advances were *bonâ fide* asked for and made with a view to keep the business going, and in the belief that they would enable B. to get over his difficulties. Afterwards C. took possession of the goods. B. being declared a bankrupt, his assignees brought trover against C., contending that the transaction in question was itself an act of *bankruptcy. On a case stating these facts, in [*718 which the Court had power to draw inferences of fact,—it was held, that the transaction must be viewed as if the bill of sale had been drawn, as it was intended to be, entirely as a security for fresh advances: and that the effect of pledging the whole of the trader's property for such advances was not necessarily to delay his creditors, as the advances, even if bearing a small proportion to the value of the property pledged, might be of more advantage to the trader and his creditors than the property itself; and, consequently, that the bill of sale in this case, being in fact *bonâ fide*, was not in point of law fraudulent, nor an act of bankruptcy. [BYLES, J.—The assignor there kept the value, whatever the result.] Lord Campbell in that case says: "I think that a conveyance by a trader of goods with a view to obtain future advances is not necessarily as a matter of law an act of bankruptcy, though the whole of the trader's stock, present and future, is included in the conveyance. If the conveyance be *bonâ fide* with a view to obtain advances for the purpose of carrying on the trade, I think it is not an act of bankruptcy. It is unnecessary to enter into the reasons which lead me to think that this is the law; for *Hutton v. Cruttwell*, 1 Ellis & B. 15 (E. C. L. R. vol. 72), is an express decision in this Court that such a conveyance is not necessarily an act of bankruptcy; and there is no authority against it." Then, dealing with the facts, his lordship says: "The property pledged was worth 6000*l.*, and the limit of the advance actually stipulated for only 1800*l.*; and the sum actually obtained was far below the value of the goods. Now, I agree that a conveyance of this sort is invalid unless there be an equivalent; but I cannot say that the advantage obtained for the trader and his creditors by these advances was not a full equivalent for the pledge. In *times of pressure, an advance in ready money of a very small amount may very often enable a trader to avoid stopping pay- [*719 ment, and so enable him to pay all his creditors 20*s.* in the pound. I

cannot, therefore, say that the inadequacy of the advance makes the deed fraudulent as a matter of law: and, drawing inferences of fact, I find it was not in this case fraudulent in fact. I do not think there was any intention to delay or defeat creditors: and, looking at the facts as they appeared at the time, I should think the transaction must have appeared to both parties likely rather to have benefited than to have defeated the creditors." And Erle, J., said: "I think that the proportion which the sum raised bears to the value of the property pledged,—in this case about one-third,—is a circumstance to be considered in determining whether the transaction is *bonâ fide* or not, but is not conclusive that it is fraudulent." In *Young v. Waud*, 8 Exch. 221,† it was held by the Court of Exchequer that the assignment by way of mortgage by a trader of his stock and implements of trade, where such assignment did not include a moiety of the whole of his effects, was not per se an act of bankruptcy, although the effect of putting the instrument in force would be to stop the business. "The law is not," says Parke, B., "that a man commits an act of bankruptcy by disabling himself from carrying on his business; but that he commits an act of bankruptcy when the necessary result of that act is to defeat or delay other creditors, who are not the object of that particular conveyance." [WILLIAMS, J.—When the assignment is by way of security for future advances, the trader will have the money in his pocket. But, what the better is he for the suretyship?] It would be the same thing to the creditors whether Reynolds or Cheeseman met any future accruing liabilities on the contracts. *720] [ERLE, *C. J.—Suppose the 250*l.* advance to Cheeseman had been repaid the next day, would not the deed stand as security for the contingent liabilities?] Clearly not: it is simply a security for the 250*l.* and any future advances which might be made. [WILLES, J.—The real question is, whether there was such an equivalent here as fairly to prevent the deed from having the effect of withdrawing the property from the reach of the creditors.] *Cur. adv. vult.*

WILLES, J., now delivered the judgment of the Court.

This is a case which was tried before my Brother Wightman at the last Assizes for Sussex. It appeared that the defendant had been security for the bankrupt Cheeseman in respect of certain contracts which had been entered into by the latter as a scavenger, and had thereby incurred a liability, and further that he had advanced to Cheeseman a sum of 250*l.*, and that Cheeseman thereupon executed an assignment to the defendant of the whole of his property; which assignment but for the present advance of the 250*l.* would unquestionably have been an act of bankruptcy, within the numerous cases on the subject, which I need not more particularly refer to. The bankrupt, who was examined as a witness, stated, amongst other things, that the deed was executed as well as a security for the advance then made and to cover the liability which the defendant had entered into on his behalf, as for the purpose of staving off the other creditors. But, in another part of his examination, he said it was to enable him to go on. At the trial a verdict was taken for the plaintiffs, the assignees; but it was reserved for the Court to say whether or not that verdict was to stand,—the Court to be at liberty to draw such

inferences of fact as a jury might have done. A rule nisi *has accordingly been obtained on behalf of the plaintiffs. Two [*721 arguments have been advanced by them in support of that rule. In the first place it was said that the deed was void, because it was an assignment of the whole of the bankrupt's property for an advance (though a substantial advance) of part of its value only; and the very able judgment of Mr. Commissioner Hill in *Ex parte Cottrell*, 1 Law Times N. S. 465, was relied on, where that learned gentleman says that an assignment of all the bankrupt's property being an act of bankruptcy, its character is not altered by the fact of there being a present advance of a portion only of the value of the property assigned. It was further contended on the part of the assignees, that, even if the deed was not void on that ground, yet, as the bankrupt admitted that one object of the assignment was to stave off the other creditors, the present advance did not prevent the deed from being an act of bankruptcy as an assignment for the purpose of defeating or delaying creditors within the meaning of the Bankrupt Act. As to the first ground, we are all agreed that we cannot adopt the doctrine contended for on the part of the assignees. We are unable to go the length to which the opinion of the learned Commissioner goes. There might have been circumstances in that case which have not been reported to us, which might justify the conclusion to which he came. But, in the broad rule which he is reported to have laid down,—that the advance of a sum of money short of the value of the property is not a substantial exception of the property assigned,—we cannot concur. If the deed professes to assign the whole of the bankrupt's goods with a colourable exception only, it is as much an act of bankruptcy as if the whole had been assigned. If there be an assignment, not of the whole, but with a real and substantial exception, in the absence of *fraud, that will not be an act of bankruptcy. In our judg- [*722 ment, a present substantial advance of money puts the transaction upon the same footing as an assignment with a substantial exception of part of the property. It is not necessarily an act of bankruptcy. The advance may be the means of enabling the assignor to go on with his trade, and so the transaction may be beneficial for the creditors. If, therefore, that had been the only point in the case, we should have had no hesitation in directing a verdict to be entered for the defendant. But there remains this most important question, viz. whether it was not manifest from the whole tenor of the evidence given by the bankrupt that this deed was concocted by Reynolds and himself for the mere purpose of staving off other claims,—in other words, to defeat and delay the rest of the creditors. The advance of even a substantial part of the value of the property at the time of the assignment would not make the transaction valid, if there were in the minds of the parties the sinister object of defeating or delaying the creditors. The case might be put of an advance of 5*l.* on the assignment of goods worth 1000*l.* Such a transaction would obviously be invalid. But, before we hold that a deed conveying property in consideration of a present advance which bears a substantial proportion to the value of the property is invalid, we must be satisfied that there exists an intention to defeat and delay and consequently to defraud the creditors. And that object must be the object not only of the

bankrupt, but also of the party who is dealing with him. A person dealing *bonâ fide* with the bankrupt would be safe. Unless he knows, or from the very nature of the transaction must be taken necessarily to have known, that the object was to defeat and delay the creditors, *723] the deed cannot be impeached. *This must obviously depend upon the facts that are brought out in evidence. If there be such fraud, the deed is void: if not, it cannot be questioned. The Court has not been able to come to an unanimous conclusion on the subject. It is a question of fact involving character, and therefore peculiarly one for the consideration not of the Court but of the constitutional tribunal for the determination of questions of that sort: and we therefore think the opinion of the jury ought to have been taken upon it. Probably, when the matter was reserved for the Court, the parties might have had in their minds the question which had been before Mr. Commissioner Hill in the case above adverted to. But the assignees clearly did not mean to abandon the other question, viz. whether the deed was fraudulent and void on the ground I have suggested.

The result is, that, the Court not being agreed upon the question of fact, and not deeming it right to take further time to consider a matter which could not properly be submitted to any other tribunal than a jury, there must be a new trial in order that the jury may say whether or not under all the circumstances the deed was fraudulent.

In the observations which I have made on this occasion, I think it right to say that I alone am responsible, except that we are all agreed that the dictum imputed to Mr. Commissioner Hill is not to be supported to its full extent, and that the question is properly one for a jury.

Rule absolute for a new trial.

*724]

*HINTON v. DUFF. Feb. 7.

The allegation in the declaration on a bill of exchange in the form given by the Common Law Procedure Act, 1852, that the bill is "now overdue," is not a traversable allegation, but part of the description of the instrument declared on.

Where, therefore, the action was commenced on the 11th of June, and the bill only arrived at maturity on that day:—Held, that the plaintiff failed to sustain his declaration, and that his right to recover was properly put in issue by "non acceptavit."

THIS was an action by an endorsee against the acceptor of a bill of exchange. The writ was issued on the 11th of June, 1861.

The declaration, which was in the form given by the Common Law Procedure Act, 1852, stated that one John Henry Thorne, on the 8th of April, 1861, by his bill of exchange *now overdue*, directed to the defendant, required the defendant to pay to the said John Henry Thorne or order 100*l.* two months after date, and the defendant accepted the said bill, and the said John Henry Thorne endorsed the same to the plaintiff; but the defendant did not pay the same.

The defendant, amongst other pleas, pleaded that he did not accept the said bill as alleged, and that the said John Henry Thorne did not endorse the said bill as alleged. Issue thereon.

The cause was tried before Pollock C. B., at the last Summer As-

sizes at Warwick, when it was objected on the part of the defendant that the bill was not due at the time of the commencement of the action, the 11th of June, 1861, being within the days of grace, and that consequently there was a fatal variance between the bill produced in evidence and the description of it in the declaration.

The learned Judge inclined to think that "now" referred to the time of declaring, and he directed a verdict to be entered for the plaintiff for the amount of the bill and interest, reserving leave to the defendant to move to enter the verdict for him, if the Court should be of opinion that the objection was well founded.

Beasley, in Michaelmas Term last, accordingly obtained a rule nisi to set aside the verdict for the plaintiff, and the judgment (if any) and all subsequent *proceedings, and for a new trial, on the grounds, —first, of misdirection on the part of the learned Judge in [*725 directing a verdict to be entered for the plaintiff, instead of directing that there was no complete cause of action, and that the plaintiff should be nonsuited, or that the verdict should be entered for the defendant, the bill produced by the plaintiff being upon the face of it, and on reference to the record, not due at the time of the commencement of the action,—secondly, that the verdict was not supported by the evidence. He also moved in arrest of judgment, on the ground that it appeared upon the record that the bill sued upon was not due at the time of the commencement of the action.

Field now showed cause.—The only pleas which are now material, are, the traverse of the acceptance and the traverse of the endorsement: and neither of these raises the question. The declaration nowhere states the day of the date. The words "now overdue" are substituted for "which period has now elapsed" in the form given by the rules of Trinity Term, 1 W. 4. [WILLES, J.—It was intended by the Common Law Procedure Act, 1852, to make the words "now overdue" part of the description of the bill; and, if so, the plea of non acceptavit puts in issue the fact of the defendant's acceptance of the bill described in the declaration.] In *Coxon v. Lyon*, 2 Campb. 307, n., the declaration (against the drawer of a bill of exchange) stated that the defendant, on the 3d day of February, 1810, at, &c., according to the usage and custom of merchants, made his certain bill of exchange in writing, &c., and then and there directed the said bill of exchange to one W. H., by which said bill of exchange the defendant then and there requested the said W. H. to pay to the plaintiff on the 1st day of August, 1809, the sum of 400*l*. The bill, being produced, *appeared to be dated 6th February, 1810; and it [*726 was contended for the defendant that this was a fatal variance. On the other hand it was submitted that the declaration did not allege the date as part of the bill, but only alleged that the defendant on that day drew the bill, being silent as to the date of it. And Thompson, B., for this reason, was of opinion that the date of the bill being different from the day in the declaration was not a material variance. The defendant here by his plea says that he did not accept such a bill as the plaintiff has described in his declaration. In *Shepherd v. Shepherd*, 1 C. B. 849 (E. C. L. R. vol. 50), 3 D. & L. 199, in debt on a promissory note, by payee against maker, the declaration, after showing that the writ issued on the 17th of May, 1845, alleged that the

defendant on the 25th of March, 1844, made his note in writing, and thereby promised to pay to the plaintiff or order 690*l.* on the 25th of March, 1845, which day had expired before the commencement of the suit, and *then* delivered the note to the plaintiff; and that thereupon the defendant agreed to pay the amount of the said note to the plaintiff, *on request*: and it was held that the declaration was sufficient, although it was objected, on special demurrer, that it was double and inconsistent, and that it was uncertain whether the plaintiff intended to rely on an express or an implied agreement. Tindal, C. J., there says: "I think this declaration is sufficient, notwithstanding the causes of demurrer assigned. It contains a distinct allegation, not under a videlicet, that, on a former day, the defendant made his promissory note in writing, and also a distinct allegation of a promise to pay the amount to the plaintiff or his order on a precise day: and it goes on to say 'which day had elapsed before the commencement of this suit.' This latter was a perfectly unnecessary allegation, inasmuch as we can see upon the face of the record that the writ issued long after *727] the note became due." The place where a bill is made is no part of the description of the bill: *Houriet v. Morris*, 3 Campb. 303. So, the allegation of a subsequent time cannot be any part of the description of a written instrument. The same answer applies to the other branch of the rule.

Beasley, in support of the rule.—"Now overdue" is clearly part of the description of the bill: and therefore the declaration is bad in arrest of judgment, unless the bill was overdue at the time of the issuing of the writ. Assume the date not to be material, the declaration is not supported by the production of a bill which was not due at the time of the commencement of the action. In *Owen v. Waters*, 2 M. & W. 91,† "which period has now elapsed" was held not to be a traversable allegation, because not necessary. There, the declaration in an action by the drawer against the acceptor of a bill of exchange stated that the bill was made on the 29th of March, payable four months after date, "which period has now elapsed." To this there was a demurrer, on the ground that it did not sufficiently appear that the bill had become due before the commencement of the suit, and that the averment "which period has now elapsed," ought to have been "which period elapsed before the commencement of this suit:" and it was held that the declaration was sufficient. In *Abbott v. Aslett*, 1 M. & W. 209,† a declaration on a bill of exchange, by the payee against the acceptor, which was according to the form given by the rules of Trinity Term, 1 W. 4, stated it to be payable three months after date, "which period has now elapsed." This declaration having been demurred to, upon a motion to set aside the demurrer as frivolous, on the ground that it did not appear that the bill was due at the commencement of the suit, Parke, B., said: "Those rules were made *728] before the Uniformity of *Process Act, 2 W. 4, c. 39, and the forms given by them would then be correct in actions by bill, because then the declaration in those actions was the commencement of the suit: but this is no longer so. The suing out the writ is now the commencement of the suit, and those forms are therefore no longer correct. In the old forms of declarations on bills of exchange, if the date of the bill was stated with certainty, it was sufficient to show that

it was payable at a certain time after the date: but, if the day were laid under a *videlicet*, it was necessary to allege that the time for payment had elapsed before the commencement of the suit or the exhibiting of the bill: and I know I used always so to aver. We cannot set aside this demurrer as frivolous." [He was then stopped by the Court.]

WILLIAMS, J.—I am of opinion that this rule should be made absolute for a new trial. The declaration in effect describes the bill upon which the action is brought as being a bill which was overdue at the time of the commencement of the suit. The meaning of a plea of *non acceptavit* is, that the defendant never accepted a bill such as that described in the declaration. At the trial, a bill is produced bearing date at such a time that it could not have been overdue at the time the action was commenced. This would have been a fatal variance before the passing of the Common Law Procedure Act: and it is so still. The declaration could not be amended, consistently with the truth, so as to give the plaintiff a good cause of action. He should therefore have been nonsuited.

WILLES, J.—I am of the same opinion. The plaintiff has obtained that which he is not entitled to. He has not only got a verdict for the amount of the bill of exchange, but also for a large amount of costs in respect of a cause of action which had no existence at the time he commenced his proceedings. The *legislature has undoubtedly [*729 given great facilities to plaintiffs in enforcing their rights on bills of exchange: but I feel no disposition to help a party who sues before the bill is due. The plaintiff was bound to show that the bill was overdue at the time of action brought. He alleges in his declaration that he has such a bill. By his plea, the defendant denies that he accepted such a bill. A similar rule has been applied in the case of a notice of dishonour. In *Castrique v. Bernabo*, 6 Q. B. 498 (E. C. L. R. vol. 51), in an action against the endorsee of a bill of exchange, issue was joined as to notice of dishonour. It appeared that a letter containing the notice was put into the post on the day on which the action was commenced, and, by the routine of the post, would reach the defendant between four and five in the afternoon of that day. No further evidence was given as to the time of notice. The offices of the Court were open only till five in the afternoon of the day in question. And it was held that the plaintiff must fail, it lying on him to show that the right of action was complete before the suit was commenced.

BYLES, J.—I am of the same opinion. The plaintiff alleges that the defendant made a certain contract with him, and he describes that contract. The defendant by his plea denies that he made the contract described. The plaintiff at the trial proves a contract different from that which he alleges in his declaration. That is a fatal variance, and, for the reasons stated by my Brother Williams, one that no amendment will cure.

KEATING, J.—I was at first inclined to think with Mr. *Field*, that the plea of *non acceptavit* referred to the time of the acceptance of the bill. But, on consideration, I think the plaintiff was bound to show a bill overdue at the time of the commencement of the action.

Rule absolute.

*730]

*MARTIN v. REID. Jan. 14.

The plaintiff, being indebted to one B. in the sum of 40*l.*, entered into a written agreement with him, whereby he agreed that B. should have his horse, van, cart, and two sets of harness, "for what he owed him;" and by the memorandum it was further agreed that B. should keep the articles mentioned until the plaintiff paid him the 40*l.*: and the memorandum concluded thus,—“The said B. has received into his possession the said horse, van, cart, and two sets of harness this 24th December, 1860.”

B. received into his actual possession the horse and van and one set of harness, but, having no place to put them in, he left the cart and the other set of harness with the plaintiff, with an understanding that he was to take them whenever he pleased.

B. having become insolvent, the plaintiff got back the horse, van, and set of harness: but B.'s assignee seized the whole of the things mentioned in the memorandum, and caused them to be sold by the defendant, an auctioneer:—

Held,—that being the only question raised at the trial,—that there had been a sufficient delivery of the goods to B. to vest the property in him, subject to the right of the pawnee to redeem; and that, consequently, the plaintiff was not entitled to recover.

Quære, as to the right of a pawnee to sell the pledge, where no day has been fixed for the payment of the sum for which the chattel is impignorated?

TROVER for a van, harness, cart, and horse. Pleas, not guilty, and that the van, harness, cart, and horse were not the property of the plaintiff. Issue thereon.

The cause was tried before Keating, J., at the sittings at Westminster after last Trinity Term. It appeared that the plaintiff, being indebted to one Jacob Bowers, entered into an agreement with him in the following terms:—

“London, Dec. 24th, 1860.

“Memorandum of agreement made and entered into this 24th day of December, 1860, between Mr. John Martin of Chesterfield Street, Marylebone, and Mr. Jacob Bowers, of No. 12, Union Place, Regent's Park, Marylebone: First, he the said J. Martin do hereby agree to allow the said J. Bowers to have my horse, van, cart, two sets of harness, for what I owe the said Jacob Bowers, namely, the sum of 39*l.* 13*s.* 4½*d.*: and it is further agreed that the said Jacob Bowers doth maintain the said horse, and keep possession of the said horse and cart and two sets of harness, and to have his own name upon the said van and cart until the said John Martin repays to the said J. Bowers the sum of 39*l.* 13*s.* 4½*d.* The said J. Bowers has received into his possession the said horse, van, cart, and two sets of harness, this 24th day of December, 1860.

“JOHN MARTIN.

“JACOB BOWERS.”

*731] *Under this agreement Bowers took possession of the horse, van, and one set of harness, leaving the cart and the other set of harness in the possession of Martin (Bowers having no convenient place to keep them), with an understanding that he (Bowers) was to have them whenever he chose. Bowers afterwards became insolvent; whereupon Martin took back the horse, van, and harness. The official assignee seized and sold the whole of the goods, and employed the defendant, an auctioneer, to sell them. On the sale they realized only 9*l.* The plaintiff had notice that the things were about to be sold, and might have redeemed them for 10*l.*

On the part of the defendant, it was insisted that the property in

the articles passed to Bowers by the agreement of the 24th of December, 1860.

The jury having found for the plaintiff, assessing the value of the goods at 9*l.*, leave was reserved to the defendant to move to set aside that verdict and instead thereof to enter a verdict for him, if the Court should be of opinion that the property did pass.

M. Smith, Q. C., accordingly, in Michaelmas Term last, obtained a rule nisi to enter a verdict for the defendant, on the ground that the plaintiff, upon the construction of the agreement, had no property to entitle him to maintain the action.

Petersdorff, Serjt., and *Hopwood*, now showed cause.—If the arrangement effected by the memorandum of the 24th of December, 1860, amounted to no more than a pawn or pledge, the pawnee had only a special property or interest in the goods, and had no right to sell them. A pledge differs from a mortgage in this, that, in the case of a mortgage, the property passes. This, it is submitted, is a mere pledge, and no time is fixed for the redemption. The distinction is clearly *expressed in Story on Bailments, § 287. "A mortgage of goods," [*732 says that learned author, "is in the common law, distinguishable from a mere pawn. By a grant or conveyance of goods in gage or mortgage, the whole legal title passes conditionally to the mortgagee; and, if the goods are not redeemed at the time stipulated, the title becomes absolute at law, although equity will interfere to compel a redemption. But, in a pledge, a special property only passes to the pledgee, the general property remaining in the pledger. There is also another distinction. In the case of a pledge of personal property, the right of the pledgee is not consummated, except by possession; and, ordinarily, when that possession is relinquished, the right of the pledgee is extinguished or waived. But, in the case of a mortgage of personal property, the right of property passes by the conveyance to the pledgee, and possession is not or may not be essential to create or to support the title." Here, the question is, whether the property passed by the contract, and by the contract alone. It is submitted that it did not. No time is mentioned for the redemption. The general property remained unaltered in Martin: the pawnee had no right to take possession and sell the goods. [WILLES, J.—In *Pothonier v. Dawson*, Holt, N. P. C. 383 (E. C. L. R. vol. 3), it was laid down by Gibbs, C. J., that, if goods are deposited as a security for a loan of money, such deposit constitutes more than the right of *lien*; and it is to be inferred that the contract between the parties is, that, if the borrower do not repay the advance, the lender shall be at liberty to reimburse himself by the sale of the deposit. And there is only one dictum the other way. WILLIAMS, J.—The point was argued, but not decided, in *Franklin v. Neate*, 13 M. & W. 481.†] In the notes to *Coggs v. Bernard*, in 1 Smith's Leading Cases, 4th edit. 171, it is said: "A *pawn* differs, on the one hand, *from a *lien*, which conveys [*733 no right to sell whatever, but only a right to retain until the debt in respect of which the lien was created has been satisfied, and, on the other hand, from a *mortgage*, which conveys the entire property of the thing mortgaged to the mortgagee conditionally, so that when the condition is broken the property remains absolutely in the mortgagee; whereas, a *pawn* never conveys the general property to the

pawnee, but only a special property in the thing pawned; and the effect of a default in payment of the debt by the pawnor is, not to vest the entire property of the thing pledged in the pawnee, but to give him a power to dispose of it, accounting for the surplus, which power, if he neglect to use, the general property of the thing pawned continues in the pawnor, who has a right at any time to redeem it." In *Ryall v. Rolle*, 1 Atk. 165, 167, Burnet, J., says: "All that can be argued from the Roman law with regard to pawns will be foreign to the question, and so will what may be argued from the English law with regard to pawns, for delivery is of the essence of an English pawn: 5 H. 7, fo. 1; Bro. Abr. *Pledges*, pl. 20, *Trespass*, pl. 271; 2 Rol. Rep. 429; and no authority contradicts these resolutions." *Ryall v. Rolle* is approved of by this Court in *Reeves v. Capper*, 5 N. C. 136 (E. C. L. R. vol. 35), 6 Scott 877. If, then, this is a pawn, it is imperfect, for want of possession: and a parol gift of chattels passes no property to the donee without delivery: *Irons v. Smallpiece*, 2 B. & Ald. 551 (E. C. L. R. vol. 5). [WILLIAMS, J., referred to Serjt. Manning's notes to *The London and Brighton Railway Company v. Fairclough*, 2 M. & G. 674, 691 (E. C. L. R. vol. 46), and to *Lunn v. Thornton*, 1 C. B. 379, 381 (E. C. L. R. vol. 50).]

M. Smith, Q. C., and *Bullar*, in support of the rule.—[ERLE, C. J. *734] —As between these parties, we do not *attach much weight to the argument that the possession did not pass to the pawnee. The difficulty we feel is as to the sale of the pawn.] That point was not made at the trial. [WILLES, J.—It has been held that the debt may be taken into consideration in mitigation of damages in an action for converting the pledge. If this point had been made, therefore, it might have been a question whether the plaintiff could have recovered more than nominal damages.] The plaintiff had notice that the sale was about to take place, and might have released the goods by tendering the amount of the debt for which they were pledged.

ERLE, C. J.—The point reserved at the trial, and upon which this rule was granted, was, whether the property in these goods passed to Bowers under the agreement of the 24th of December, 1860. The transaction was this: Martin, being in possession of a horse, a van, a cart, and two sets of harness, and being indebted to Bowers, delivered to him the van, horse, and one set of harness, and authorized him by a written memorandum to take the cart and the other set of harness, to hold until Martin repaid him his debt. The effect of this arrangement was, that the goods were handed to Bowers as a pledge. Bowers stood in the position of a pawnee. Now, I take the law to be, that to constitute a valid pledge, there must be a delivery of the article, either actual or constructive, to the pawnee; and, inasmuch as the memorandum purported to assign the property to Bowers, and as the horse and cart remained in the stable of Martin, the question is whether there has been a valid pledge here. The evidence on this point was, that Bowers, having no stable, requested Martin to allow the cart and harness to remain in his. In the written agreement, the articles are *735] stated to be in the possession of Bowers. *Possession is an equivocal term: it may mean either actual manual possession or the mere right of possession. The question is, whether, as between these parties, the words used constitute the premises of Martin the

premises of Bowers for this purpose. I am clearly of opinion that the intention of the parties will be carried out by holding them to be so. It has over and over again been decided that the words of an agreement are to have effect according to the mind and intention of the parties. Thus, a delivery of goods in satisfaction of a debt has been held to amount to payment.^(a) So, where goods have been purchased and left in the possession of the vendor for a special purpose of the vendee, that has been held to amount to a delivery.^(b) So, where a horse was sold, but left in the stable of the seller, being only removed to another stall, that was held to amount as between the buyer and the seller to a delivery. And in many instances the warehouse of the vendor has been held to be the warehouse of the purchaser, in order to carry out the intention of the parties. I therefore think there was in this case a sufficient delivery of these articles to the pawnee, and consequently this rule must be made absolute.

WILLIAMS, J.—I am of the same opinion. The only question reserved at the trial, was, whether the property mentioned in the memorandum of the 24th of December, 1860, passed to Bowers by way of pawn, by virtue of that instrument and the parol evidence. For the reasons given by my Lord, I think it cannot be disputed that there was evidence of a sufficient delivery within the rule. I do not wish to express any disrespect for the note by Mr. Smith to the case of *Coggs v. Bernard*, which has received the sanction of the learned editors of the last edition of that very valuable work. [*736] It is clear that the proceeds of the goods were not sufficient to cover the debt; and consequently no injustice will be done by allowing the pawnee to keep the produce of the sale. It is to be observed, however, that the note to *Coggs v. Bernard* supposes a day fixed for the redemption of the pledge; here, that fact is wanting. It is unnecessary to decide the point, for it is agreed on all hands that it was not reserved.

WILLES, J.—I am entirely of the same opinion. This is an attempt to set aside the agreement entered into between Martin and Bowers. The only question raised at the trial was, whether or not that agreement had the effect of passing the property to Bowers. This, like all other agreements, is to be construed, if possible, so as to carry into effect the intention of the parties: and that is best done by the construction which my Lord has put upon this instrument. The ground, therefore, taken by the plaintiff at the trial fails him. As to whether, notwithstanding that point fails the plaintiff, he might not have succeeded upon another, I agree that we are not called upon to go into that; though, if we thought any injustice had been done, we might have been disposed to grant a new trial, upon terms. But I think it likely that the learned counsel were aware that it had been decided. In cases of bare lien, it has been held that the jury may mitigate the damages due for the conversion by the amount of the debt due: and it would be idle to grant a new trial merely to bring about a nominal verdict. As to the right of the pawnee to sell the pledge, whenever that question comes to be decided, it will be necessary to refer to the civil law as stated in Mackeldey's *Systema Juris Romani*, title *Pledge*,

(a) See *Cannan v. Wood*, 2 M. & W. 465.†

(b) *Elmore v. Stone*, 1 Taunt. 453.

*737] from which probably Mr. *Smith, who was well acquainted with the Roman law, drew what is stated in the note referred to, and for the application of which to the law of England the case of *Pothonier v. Dawson*, Holt 383, is an authority. It may be found on examination that Mr. Smith is right. I do not mean to express any opinion: but I think it right to say thus much.

KEATING, J.—The only question really put forward for the plaintiff at the trial, was, that there had been no sufficient delivery of the articles in question to Bowers. For the reasons already stated, I think there was a sufficient delivery.

Rule absolute.

FULLWOOD v. AKERMAN and Wife, Administratrix of JOHN BOARD. *Jan. 14.*

By an agreement between A. and B., it was stipulated that A. should for a certain term receive half the profits arising from the sales of an article called Russian Black manufactured by him from the produce of certain quarries of B. :—Held, that A. was not entitled to claim anything in respect of Russian Black not sold as such, but used by B., in the proportion of about one third, mixed with cement manufactured and sold by him.

THIS was an action against the representatives of one John Board, for an alleged breach of an agreement entered into by the intestate in his lifetime.

The declaration stated, that, by an agreement in writing dated the 28th of August, 1849, between the plaintiff, therein described as an inventor of cement, and the said John Board, therein described as a cement manufacturer, it was agreed that the said John Board, his executors, administrators, and assigns, should allow and pay unto the plaintiff for the term of fourteen years from the date of the said agreement one-half of the profits arising from the sales of an article *738] denominated **"Imperial Vegetable Russian Black,"* invented and discovered by the plaintiff, and made from the quarries of the said John Board, and the said John Board should receive and be allowed an extra 12s. per ton weight on every ton so made, for the use of his premises, machinery, coal, and labour in making the same, and that all ready money transactions arising from the sales of the said article should be equally divided by the plaintiff and the said John Board as soon as the bills should be paid, and that all sales effected for credit should be finally settled up within a month after payment; and it was thereby also agreed that proper and distinct books should be kept, containing a true and proper account between the said parties of all entries of sales from time to time, and showing a correct debit and credit account, the said books to be kept on the premises of the said John Board, and the plaintiff to have access to them at all seasonable times, and that no person should have access to the manufactory where the said article was made, except one Henry George Chard and the said John Board and the plaintiff; and it was thereby also further agreed that the said John Board should not neglect to execute the orders that might be sent to the works of the said John Board, so as to be an injury to the plaintiff, and that the stock in

hand should not be less than one ton in weight; and it was thereby also further agreed that all ingredients to be used in the manufacture of the said article should be bought by the said John Board, and paid for by the plaintiff and the said John Board, and that the said agreement should not constitute a partnership between the plaintiff and the said John Board: Averment, that, although all things had happened and been performed, and all times had elapsed necessary to entitle the plaintiff to be paid a large sum of money by the said John Board as and for his the *plaintiff's share of the said profits, pursuant [*739 to the said agreement, yet the said John Board did not pay or allow to the plaintiff, nor had the said Julia Catherine Sullivan Akerman, administratrix as aforesaid, since the death of the said John Board, paid or allowed to the plaintiff, his said share of the profits, or any part thereof: And the plaintiff further said that the said John Board did not keep proper books containing a true or proper account or entries of sales of the said article, or showing a correct debit and credit account, pursuant to the said agreement in that behalf, nor did he permit the plaintiff to have access to the said books at all seasonable times, pursuant to the agreement in that behalf: And the plaintiff further said that many persons other than the plaintiff, the said John Board, and the said Henry George Chard, were allowed by the said John Board to have and did have access to the said manufactory, contrary to the said agreement in that behalf. And the plaintiff further said that the said John Board did neglect to execute the orders for the said article that were sent to his said works, so as to be an injury to the plaintiff, and did keep stock in hand less than one ton in weight, contrary to the said agreement in that behalf: and that all things had happened and been performed and all times elapsed necessary to entitle him to maintain this action: Claim 5000*l*.

Plea, payment into Court of 5*l*. Replication, damages ultra.

The cause was tried before Keating, J., at the sittings at Westminster after last Trinity Term. The facts which appeared in evidence were as follows:—The intestate, John Board, was a cement manufacturer, possessing quarries from which he obtained the material for his manufacture. The plaintiff, who had been in his employ since 1847, discovered that a new article of *commerce might be produced [*740 by burning certain bituminous shale which was found in large quantities in the quarries, but which could not be made available for the manufacture of cement. This new product he called "Imperial Vegetable Russian Black;" and, in consideration of his discovery, the agreement declared upon was entered into between him and Board. After some time it was found that there was little or no sale for the vegetable black, but that it might profitably be used to mix with the cement in the process of manufacture, and large quantities were accordingly made and used for that purpose, to the extent of a fourth or a third of the whole bulk. It was for his share of the profit of what was so used that the plaintiff brought this action.

The sum paid into Court was paid in for the purpose of covering anything the plaintiff might be entitled to in respect of sales of the article in the shape of vegetable black since the date of the award in a previous action by the plaintiff against Board in his lifetime: and it was sufficient for that purpose.

It was submitted on the part of the defendant, that all that was contemplated by the agreement was, that the plaintiff was to have the stipulated share of the profit upon all the black which was sold as a distinct article of commerce, but not for what was sold in the shape of cement, on which he already had a profit.

The learned Judge was of this opinion, and accordingly nonsuited the plaintiff,—leave being reserved to the plaintiff to move to enter a verdict for such sum as an arbitrator should determine, if the Court should be of opinion that the construction adopted by the learned Judge was an erroneous one.

Powell, in Michaelmas Term last, obtained a rule, on the ground *741] “that the plaintiff is entitled to one-half *the profits on the black used and sold in cement made by Board or the defendants since the date of the award in the previous action.”

Kinglake, Serjt., and *Cole* now showed cause.—The agreement is to be construed according to the intention of the parties, to be gathered from the document itself and the surrounding circumstances. The document contains nothing to warrant the present claim: it entitles the plaintiff to a share of the profit on all the Imperial Vegetable Russian Black sold as such; but it did not preclude the intestate from using the bituminous shale in the manufacture of cement.

Powell and *Macnamara*, in support of the rule.—The question is, whether the plaintiff is to be deprived of his share of the profits made by the sale of the Russian Black because it happens that the intestate found it more conducive to his interest to dispose of it by turning it into cement than to sell it by itself as a distinct article of commerce. [WILLIAMS, J.—It is not sold in the shape of black; and it is not suggested that what was done in order to evade the agreement.] No fraud is suggested. But, suppose Board had purchased the black to be used by him either in the manufacture of cement or in any other way he chose, would not the plaintiff have been entitled to his share of the profit? The question is, whether that which takes place here is not equivalent to a sale. [WILLES, J.—There is nothing in the agreement to prohibit Board from using any portion of the shale converted into black.] Not in terms.

ERLE, C. J.—I am of opinion that this rule should be discharged. *742] It appears that the plaintiff had been *employed by Board since the year 1847 in manufacturing cement, receiving by way of remuneration 4*d.* for every five bushels manufactured, and that, in the year 1849, he suggested to Board that certain bituminous shale, which was not adapted for the making of cement, might by a process with which he was acquainted be converted into an article which he called Imperial Vegetable Russian Black, which would be valuable for many purposes. Board went to some expense in the erection of machinery to carry out the scheme; but, the article thus produced not finding ready sale, it was used by Board in the manufacture of cement, and sold in its mixed state. For anything that appears, the Imperial Vegetable Russian Black, as a separate article of commerce, wholly failed: and the question is, whether the plaintiff is entitled under the agreement to a share of profit on the sales of cement into the manufacture of which the Russian Black entered as an ingredient. In terms, the agreement provides that the plaintiff shall have one-half of

the profits arising from the sales of the article in question. No sales of the article have taken place. If there had been anything like a fraudulent evasion of the agreement, there might have been ground for the interference of a Court of equity. But no fraud is suggested; and the circumstances disclosed by the evidence lead to the conclusion that that which was at first supposed to be a valuable article turned out a failure. The bituminous shale as Russian black will not pay: but, mixed with the other materials to the extent of a fourth or a third, it could be profitably sold in the shape of cement, and the plaintiff would receive a share of the profit to the extent of 4*d.* for every five bushels so mixed and sold. It seems to me that this construction gives full effect to all the words of the agreement, and that the surrounding *circumstances show that it is in accordance [*743 with the probable intention of the parties.

WILLIAMS, J., concurred.

WILLES, J.—I am of the same opinion: and I would only add that I consider the cement in this case even more different from the article called Imperial Vegetable Russian Black, than was the patent fuel in *The Mayor of London v. Parkinson*, 10 C. B. 228 (E. C. L. R. vol. 70), from coal. As in that case the patent fuel, which was composed of coal dust mixed with 13 per cent. of pitch and lime, was considered not to be "coal" within the 1 & 2 W. 4, c. lxxvi., ss. 23, 60, notwithstanding that there was no purpose to which ordinary pit-coal could be applied, to which coal dust without the admixture of pitch and lime could not also be applied,—so here, though partly composed of the Russian black, the cement manufactured by the intestate was not the article in respect of which the plaintiff was to receive a share of profits.

KEATING, J., concurred.

Rule discharged.

***WYATT v. THE METROPOLITAN BOARD OF WORKS.** [*744
Jan. 27.

The 56th section of the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), enacts that "the costs, charges, and expenses of an incident to the passing of this Act, and preliminary thereto, shall be paid by the Metropolitan Board of Works" out of certain funds:

Held, that the persons to whom such payment is to be made by the board, are, the promoters of the Act, and not the solicitor or parliamentary agent retained and employed by them for hire and reward to do the necessary work.

THE declaration stated, that the defendants were the Metropolitan Board of Works mentioned and referred to as The Metropolitan Board of Works in a certain Act of Parliament, to wit, "Metropolis Gas Act, 1860" (23 & 24 Vict. c. 125), and that the plaintiff, before the making and passing of the "Metropolis Gas Act, 1860," was retained and employed by and on the behalf of certain persons to solicit and obtain an Act of Parliament, and the said persons did solicit the said Act, that is to say, "The Metropolis Gas Act, 1860," which was obtained, and the necessary and proper costs, charges, and expenses of the plaintiff attending the applying for and obtaining and passing the said Act amounted to a large sum of money, which said costs, charges, and expenses of the plaintiff were costs, charges, and expenses

of and incident to the passing of the said Act of Parliament and preliminary thereto, and were due to the plaintiff at the time of the commencement of this suit, and ought under the said Act of Parliament to have been paid to the plaintiff out of the funds thereafter referred to: That, after the making and passing of "The Metropolis Gas Act, 1860," and before the commencement of this suit, the defendant levied certain funds from the vestries and district boards mentioned and referred to in s. 56 of the said Act of Parliament, being the proper vestries and district boards in that behalf, and the defendants before and at the time of the commencement of this suit had in their hands and possession certain of the said funds which ought to have been paid and applied by them under the said Act of Parliament in and *745] towards the payment of the said costs, charges, and *expenses of the plaintiff,—of all which the defendants had notice: That, before the commencement of this suit, all things had happened and occurred, and all times had elapsed, which it was necessary should occur, happen, and elapse to entitle the plaintiff to sue in this action for the said costs, charges, and expenses, and for the defendants' breach of duty hereafter mentioned: That the plaintiff had always been ready and willing to do all things which it was necessary he should be ready and willing to do to entitle him to sue the defendants in this action for the said costs, charges, and expenses, and the said breach of duty: Yet that the defendants had not paid to the plaintiff the said costs, charges, and expenses of the plaintiff, or any part thereof, or any portion of the said funds so applicable to the payment of the last-mentioned costs, charges, and expenses as aforesaid: Claim 4000l.

Plea, that, before and whilst the plaintiff was soliciting the Metropolis Gas Act, 1860, on the retainer of the said persons who so retained and employed him as in the declaration mentioned *for hire and reward to be paid by them in that behalf*, (a) he the plaintiff received from the said persons on account of the work done and to be done under the said retainer divers sums of money amounting to less than the whole of the costs, charges, and expenses of the plaintiff attending the applying for, obtaining, and passing of the said last-mentioned Act; and such persons or some of them claimed and insisted that the plaintiff should give credit for such sums and receive only the balance of such costs, charges, and expenses as aforesaid after giving such credit; and the plaintiff denied that he was bound to give such credit against the *746] said costs, charges, and expenses, and refused to accept the *balance after giving credit for the same; and there never was any agreement between the plaintiff and the said persons by whom he was retained as in the declaration mentioned, as to whether such credit should be given or as to any amount for which credit should be given: That the plaintiff's said employers, or some of them, gave notice to the defendants of the premises, and required them not to pay to the plaintiff more than a certain amount, being the balance admitted by them to be due to the plaintiff, and to hold the residue for the said employers of the plaintiff; and the defendants had always been ready and willing to pay to the plaintiff the said last-mentioned admitted balance, but the plaintiff had refused to accept the same, and insisted that the defendants were bound to pay him the full amount of his said

(a) The words in italics were added during the argument, at the suggestion of the Court.

costs, charges, and expenses, without any deduction on account of what he had so received as aforesaid.

Second replication,—that the said sums of money alleged by the plea to have been received by the plaintiff were not received solely on account of the said costs, charges, and expenses of and incident to the passing of the said Act of Parliament and preliminary thereto, but generally on account of such costs, charges, and expenses, and certain other and different costs, charges, and expenses, amounting to a large sum of money, for which the said persons who so retained and employed the plaintiff as in the declaration mentioned were always liable to the plaintiff; and that the plaintiff always claimed to appropriate, and before the commencement of the suit did appropriate, a large and sufficient portion and no more of the said sums of money so received as aforesaid towards and in payment of the said last-mentioned costs, charges, and expenses for which the said persons who so retained the plaintiff as aforesaid were liable; and that, after *allowing for [747 and deducting the said sums of money so received by the plaintiff as aforesaid, less the said sums so appropriated as aforesaid, from the amount of the said first-mentioned costs, charges, and expenses, there was a larger balance due to the plaintiff in respect thereof than the said balance which in the plea it was alleged they the defendants were ready and willing to pay to the plaintiff as in the plea mentioned.

The plaintiff also demurred to the plea. Joinder.

The defendants demurred to the second replication, the ground of demurrer stated in the margin being, "that the declaration as well as the second replication are bad, on the ground that the defendants' liability under the Metropolis Gas Act, 1860, is not to the plaintiff, but to his clients." Joinder.

Prentice (with whom was *Coleridge*, Q. C.), for the plaintiff.—The substantial question, viz., the right of the plaintiff to maintain this action, depends upon the construction of the Metropolis Gas Act, 1860, 23 & 24 Vict. c. 125, s. 56, which enacts that "the costs, charges, and expenses of and incident to the passing of this Act, and preliminary thereto, shall be paid by the Metropolitan Board of Works, out of such funds as may be and shall be levied by their authority from the several vestries and district boards, in proportion to their annual rateable value, and such amount shall be included in the precept of the Metropolitan Board under the authority of the 18 & 19 Vict. c. 120, for the local management of the Metropolis." The contention on the part of the defendants, is, that the solicitor or parliamentary agent employed in soliciting the bill is not the person to sue under the Act for the costs, charges, and expenses thereby incurred, but that the action must be brought by the clients, the promoters of the undertaking. There is, however, no authority *for that position; and [748 it is submitted that the action is well brought by the solicitor. In *Tilson v. The Warwick Gas-Light Company*, 4 B. & C. 962 (E. C. L. R. vol. 10), 7 D. & R. 376 (E. C. L. R. vol. 16), an Act of Parliament for incorporating a gas-light company enacted that all the costs of obtaining the Act should be paid and discharged out of the moneys subscribed in preference to all other payments: and it was held that the attorneys who obtained the Act might maintain an action of debt,

founded upon the statute, for their costs. The authority of that case was recognised by this Court in *Carden v. The General Cemetery Company*, 5 N. C. 253 (E. C. L. R. vol. 35), 7 Scott 97, where Tindal, C. J., in delivering the judgment of the Court, says: "The first objection which has been raised, is, that, as the plaintiff had no legal claim against any one before the passing of the Act for his labour and expenses, the same having been bestowed and incurred without any request from any one, and therefore, as it is contended, gratuitously, so the Act never intended to give him a claim against the defendants which he had not before against some individual. But, looking at the 20th section of the statute under which the defendants were incorporated, we think the labour and expenses described in the declaration are precisely those which are intended by the 20th section of the Act to be paid and discharged out of the first moneys which shall be raised by the company by virtue of such Act. The Act probably contemplated the difficulty which would arise from many of the expenses being necessarily incurred, and much care and labour necessarily bestowed, before the Company were incorporated, and, consequently, at a time when there could be no privity of contract between the party who had so expended his money and bestowed his labour, and the Company; and therefore expressly directs that all the money to be raised by the Company by virtue of the Act shall be laid out *749] and applied, in the first place, in paying and discharging all costs and expenses incurred in applying for and obtaining and passing the Act, and all other expenses preparatory or relating thereto. It seems therefore to us that the very object of the clause was to give a remedy to the plaintiff where he had none before." If these two cases are rightly decided, the defendants might, if sued by the clients, plead payment to the solicitor, and that would be a good answer. Upon these pleadings, it is difficult to understand what the defence really is. The plea is in effect an informal plea of tender. The defendants do not say that the money they are ready to pay is really due, but only that it is the sum which the clients admit to be due. [ERLE, C. J.—You need not labour the plea, if you make out the plaintiff's right to sue. WILLIAMS, J.—All that the plea shows, is, that there is another paymaster.]

Gray (with whom was *Raymond*), *contra*. (a)—The 56th section of the Act is introduced in ease of the promoters. It does not say to *750] whom the costs and *expenses are to be paid; but merely that "the costs, charges, and expenses of and incident to the passing of this Act, and preliminary thereto, shall be paid by the Metropolitan Board of Works." The obvious meaning of that is, that they are to reimburse the persons by whom the Act has been promoted the sums

(a) The points marked for argument on the part of the defendants were,—

"1. That the plaintiff's employers, and not the plaintiff, ought to have brought the action:

"2. That the defendants' liability under the Metropolis Gas Act, 1860, is not to the plaintiff, but to his clients:

"3. That, where there are disputed accounts between the promoters of the Act and their solicitor, and where the solicitor has received money on account, he cannot sue the defendants, who have no means of ascertaining to how much he is entitled:

"4. That the costs, charges, and expenses, the payment of which by the defendants is provided for by the Act, are not necessarily confined to those of the solicitor, or of one solicitor; and the Act did not contemplate subjecting the defendants to liabilities to several parties."

they have necessarily disbursed, including the bill of costs of their solicitor. There is no privity between the Metropolitan Board and the solicitor. See the difficulty which any other construction would impose upon the board. One who promotes an undertaking like that in question employs a solicitor; he employs a parliamentary agent, for whose charges the client is liable; and the client has probably himself incurred expenses before the employment of the solicitor,—Is the promoter to have an action against the board for the expenses incurred by him, and the solicitor and the parliamentary agent also each an action for the amount of his charges? [KEATING, J.—How could the board know the state of accounts between the parties?] It would be impossible: whereas, if the remedy of the solicitor is confined to his clients, the matters of account may be readily adjusted, and he may recover all from them. [WILLES, J.—I suppose we are to assume that the persons who employed the plaintiff are liable to him for the charges in question, though that is not very distinctly stated. I have drawn many declarations of this sort, where the party suing has always been the attorney.] The point has never been raised before. When the plaintiff undertook to solicit the bill, he could not have known that this clause would be inserted in it. The object of it clearly was, to give a remedy to some one who otherwise would have had none. [ERLE, C. J.—It is not stated distinctly that the plaintiff had a claim upon his clients. These things are seldom undertaken on the faith of personal *liability.] That observation would have had more force if this had been the case of a [*751 private trading company, where they themselves receive the benefit of the incorporation. The plea shows payments on account. It may be that the plaintiff has been paid by the parties who employed him the amount mentioned in the Speaker's certificate, and that he may have another sum due to him from those parties, to which, in the absence of a specific appropriation by them at the time of payment, he might claim to appropriate these payments. There is no authority upon the subject at all binding on the Court. The plaintiff's right to sue was assumed in *Tilson v. The Warwick Gas-Light Company*; and the point could not arise in *Carden v. The General Cemetery Company*.

Coleridge, Q. C., in reply.—The statute 23 & 24 Vict. c. 125, as appears from the preamble, is a public Act, passed for public purpose; and there is nothing in the Act, or on this record, to show that the plaintiff has any recourse against any individual for the costs he has incurred. Under the 56th section, it is submitted, any person who has fairly expended money in promoting the Act has a right to claim to be reimbursed out of the fund authorized by the legislature to be levied by the Metropolitan Board for that purpose. It is said that the plaintiff has no right of action against the Board, because the persons who employed him would have such right. There is nothing in the section to show to whom the costs and expenses are to be paid: there is, however, a general averment in this declaration, that "all things had happened and occurred, and all times had elapsed, which it was necessary should occur, happen, and elapse to entitle the plaintiff to sue in this action." Upon this demurrer, it must be assumed

*752] that the costs have been duly taxed, *and the certificate of the Speaker obtained, under the House of Commons Costs Taxation Act, 1847, 10 & 11 Vict. c. 69; and, those costs having been incurred by the plaintiff in soliciting a public Act for public purposes, and there being no averment in the plea that any individual is liable for them, there can be no reason why the plaintiff should not be reimbursed by the Metropolitan Board of Works under the provision enabling them to raise a fund for the purpose. [ERLE, C. J.—We will assume that the plea is amended by adding after the allegation of the plaintiff's retainer and employment the words "for hire and reward to be paid by them in that behalf."]

ERLE, C. J.—I am of opinion that the plea as amended is good, and an answer to the action. The action is brought upon the 23 & 24 Vict. c. 125, s. 56, in respect of costs, charges, and expenses incurred by the plaintiff in obtaining the Act for the better regulating the supply of gas to the Metropolis. The 56th section provides that the costs, charges, and expenses incident to the obtaining the Act shall be paid by the Metropolitan Board of Works out of the funds in their hands. The plaintiff was retained and employed by certain persons not named on the record, who were the promoters of the Act, who were liable to him for his services in respect of what he did to procure the passing of that Act. The plaintiff has brought his action against the Metropolitan Board of Works. I am of opinion that the parties who were the promoters, and who employed him to do the work and are liable to him in respect of that work, are the parties who ought to sue the Metropolitan Board of Works, and not the present plaintiff. It is an Act of Parliament of a peculiar nature, different from most of the Companies' Acts, where the parties who are the promoters are generally

*753] *persons having an interest in the Company; and it may therefore well be in such cases that the expenses of obtaining the Act are properly payable out of the funds of the corporation,—funds in which the promoters are themselves interested. Those cases differ materially from the present; for, here, all the gas companies of the Metropolis were to be blended and amalgamated under this Act in respect of the supply of gas for the Metropolis: and the costs of soliciting and obtaining the Act are cast upon a set of strangers, for such are the Metropolitan Board of Works for the purpose of this observation, to the gas companies and those interested in the manufacture of gas. Then, does the 56th section mean that every person who renders any service in the course and progress of the Act should have an action against the Metropolitan Board of Works? It seems to me that the consequences would be so very inconvenient, that it is impossible that the legislature could have so-intended. It may be, as is put by Mr. *Gray*, that the plaintiff has been paid by the parties who employed him the sum mentioned in the Speaker's certificate, and might have another sum due to him from those parties, and might claim a right, in the absence of a specific appropriation at the time, to appropriate that to the other debt, and the promoters of the Act might at the same time have a cause of action against the Metropolitan Board of Works for the sum which they had paid to the plaintiff. It would be extremely inconvenient that the party to pay should be removed one off from the party doing the act. If the parliamentary

agent may sue the Metropolitan Board of Works in respect of his services, why should not the law-stationer likewise have a right to sue? It seems to me that the parties who are liable as the promoters of the Act for the general expenses incurred in soliciting it, are the parties liable to pay *those by whom those expenses were incurred, and that they alone have a claim against the Metropolitan Board of Works in respect of the one sum total under this Act. [*754]

WILLIAMS, J.—I am quite of the same opinion. The plea being amended, and all doubt removed as to whether or not the plaintiff was employed by parties who would be liable to him for these expenses, I think it is quite clear that the promoters alone are the parties to whom the Metropolitan Board of Works is responsible.

WILLES, J.—I am of the same opinion. The sums mentioned in the 56th section of the Act as the sums to be paid by the Metropolitan Board of Works, are, "the costs, charges, and expenses of and incident to the passing of the Act, and preliminary thereto." At first sight, it would seem that the word "costs" refers to *legal* costs, and that the person to be paid is the solicitor or the parliamentary agent. In the cases referred to, of *Tilson v. The Warwick Gas-Light Company* and *Carden v. The General Cemetery Company*, the action was brought by the person professionally employed in promoting the Act: but in neither of them was it material to consider the question which is now raised. The declaration in the former of those cases was very like the declaration here: but the objection was not taken. It may be that in that case there was no payment to be made to Mr. Tilson by any person in the event of the application proving unsuccessful. The Court may be said to have declined to draw the inference that any other person was to pay. Perhaps here we might have assumed from the declaration that another person was liable to the plaintiff for these costs: but the amendment which has been made in *the plea [*755] puts it beyond doubt that the plaintiff was retained and employed by certain persons, for hire and reward to be paid by them in that behalf, to solicit and obtain the Act, and that the costs in question are due to him from those persons. For the reasons, therefore, given by the Lord Chief Justice, the plea affords a defence to the action. It shows that the persons who would be liable to pay, if the Metropolitan Board of Works did not, are the persons who are entitled to call upon the board. If it were otherwise, the inconveniences pointed out by my Lord would necessarily result. I think "the costs, charges, and expenses," in the 56th section, means the costs, charges, and expenses which the persons soliciting the Act would have had to pay if this provision had not been inserted in the Act; and that those are the persons to whom the costs are to be paid by the board.

KEATING, J.—I am of the same opinion. The plea is clearly bad as a plea of tender but the amendment entirely alters the complexion of the case, and gets rid of the difficulty suggested by the cases referred to. In truth, the state of things here is very different from what it was in those cases. It was never intended by the 56th section of this statute to destroy the privity of contract between the promoters of the Act and the person they employed to solicit it for them. It appears from the record that they made payments, which the plaintiff

claims to appropriate in a particular way. It was not intended by the legislature that such a question should be contested between a person like the present plaintiff and the Metropolitan Board of Works. It would be a most inconvenient state of things. The plea, as amended, *756] clearly furnishes an answer to the action. *The only persons entitled to sue the board are the persons who employed the plaintiff.

WILLES, J.—It ought to be added that the replication deals only with immaterial parts of the plea, and is therefore bad.

Judgment for the defendants.

WATSON v. SWANN. Jan. 29.

To entitle a person to sue upon a contract, it must be shown that he himself made it, or that it was made *on his behalf* by an agent authorized to act for him at the time, or whose act has been subsequently ratified and adopted by him: and the person for whom the agent professes to act must be capable of being ascertained at the time.

S., an insurance broker at Hull, being instructed to effect an open policy for 5000*l.* for the plaintiff, against jettison only, "subject to declaration thereafter," and being unable to do so, declared certain deck cargo shipped for Ostend on board one of the plaintiff's vessels on the back of a general policy which he had previously effected for himself "upon any kind of goods and merchandise, as interest might appear," and got it initialed by the underwriters. A loss having happened,—Held, that it was not competent to the plaintiff to maintain an action against the underwriters upon this policy, the contract not having been made by him or on his behalf at the time.

THIS was an action upon a policy of assurance.

The declaration set out the policy, which was an open policy to cover 2000*l.*, dated the 28th of December, 1860, and purporting to be effected by Messrs. Gray, Beavis & Caffall, "as well in their own names as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all," and to be an insurance at and from any port on the east coast of Great Britain to any port on the continent between Hamburg and Havre, "upon any kind of goods and merchandise whatever (except phosphorus and sulphuric acid), with average as customary, to be valued and declared as interest might appear; goods on deck being insured against risk of jettison only: Averment, that the defendant subscribed the policy for 200*l.*; that goods not being phosphorus or sulphuric acid were shipped at Grimsby, a port on the east *757] coast of Great Britain, on board the steamer *La Plata*, on *the deck of the said vessel, to be carried therein on a voyage from Grimsby to a port on the continent between Hamburg and Havre, to wit, the port of Ostend; that the said goods were afterwards duly valued and declared on the said policy; that the plaintiff, at the time of the sailing of the said steamer, and from thence continually afterwards until and at the time of the loss thereafter mentioned, was interested in the said goods to the amount of all the moneys insured thereon; and that the said insurance was made as to the said goods so shipped for the use and benefit and on account of the plaintiff, so being interested as aforesaid. The declaration then averred a loss of the goods by jettison, and that the defendant's proportion of the average loss in respect of the sum insured by him was 12*l.* 1*s.* 8*d.*

The defendant pleaded, amongst other pleas,—fifthly, that the policy was not made for the use and benefit or on account of the plaintiff.

The cause was tried before Williams, J., at the last Summer Assizes for the county of Surrey. The facts which appeared in evidence were as follows:—On the 28th of December, 1860, a policy of insurance (against jettison only) was effected by Messrs. Gray, Beavis & Caffall, insurance brokers in London, by order and on account of Mr. W. Norton Smith, an insurance broker at Hull, “on goods to be valued and declared as interest may appear,” at a premium of 5 per cent. for a voyage from any port or ports on the east coast of Great Britain to any port or ports on the Continent between Hamburg and Havre.

Norton Smith, on the 9th of January, 1861, received a letter from the plaintiff, a merchant at Goole, who owned several steamers trading between Hull and the Continent, directing him “to take out an open policy to cover risk for a value of 5000*l.* against jettison on [*758 *deck, subject to declaration thereafter, on machinery, cotton, and other general cargo, from or between Goole, Hull, or Grimsby, and Antwerp, Ghent, Ostend, and Dunkirk;” and on the 12th of January, referring to the proposed policy, the plaintiff again wrote to Smith a letter which contained the following instructions,—“We now beg to declare shipment on deck, per La Plata, of to-day, from Grimsby to Ostend, of the following:—[Then followed a description of the goods to be declared, including those in respect of the loss of which this action was brought.] The weather being bad, the underwriters would insure nothing under 10*s.* or 12*s.* 6*d.* per cent., and would not insure at any price against jettison only. Smith thereupon wrote to Gray, Beavis & Caffall, desiring them to endorse upon *his* policy a declaration of *the plaintiff's goods* per La Plata, and get the same initialed by the underwriters. The slip which he sent them for that purpose was as follows:—

Name of ship.	Captain.	From	To	Particulars.
La Plata steamer.	Mason.	Grimsby.	Ostend.	S. L. C. Cylinder and packages . . . 20 <i>l.</i> G. B. C. 3/6. 4 cases machinery . . . 100 <i>l.</i> R. 25 bales E. I. cotton . . . 252 <i>l.</i> <div>£372</div>
On deck, against risk of jettison only. Hull, 14th January, 1861.				

The policy was endorsed and initialed accordingly. Smith then wrote the plaintiff a letter on the 14th of January, sending him a form of policy for the ship La Plata with an insurance of the required

*759] amount at 7s. 6d. per cent., but mentioning no underwriters' names, merely saying "underwriters as per open policy."

The *La Plata* started on the 13th of January, and a loss by jettison occurred on the 14th, which the plaintiff paid,—the shipowner being by the custom of the trade liable for the loss by jettison of deck cargo.

On the part of the defendant it was objected that the plaintiff was not entitled to sue upon the policy in question, the contract not having been made with him or on his behalf.

The learned Judge, without expressing any opinion, directed a verdict for the plaintiff for the amount claimed, 12l. 14s. 8d., reserving leave to the defendant to enter a verdict for him, if the Court should be of opinion that the objection was well founded.

Bovill, Q. C., accordingly, in Michaelmas Term last, obtained a rule nisi to enter a verdict for the defendant, on the ground, that, "upon the facts, the action was not maintainable by the plaintiff, that there was no contract with him, and that he could not sue the defendant upon the policy in question."

Lush, Q. C., and *J. Brown*, now showed cause.—The facts are these:—The plaintiff is the owner of a line of steamers trading between Grimsby and Ostend and other places on the Continent, which were in the habit of carrying deck cargo, for which as owner by the custom of the trade he would be responsible. It being impossible to know whether or not there will be deck cargo put on board, or of what it will consist, so as to effect a specific insurance upon each shipment, a practice has long prevailed to take out general policies, the risk "to be valued and declared when ascertained." Here Smith, the insurance broker, had, through Messrs. Gray, Beavis & Caffall, "as *760] well in their own names as *for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain, in part or in all," effected a policy at and from any port on the east coast of Great Britain to any port on the Continent between Hamburg and Havre, "upon any kind of goods and merchandise, to be valued and declared as interest might appear."—goods on deck being insured against the risk of jettison only. The premium on this policy was 5s. per cent. The plaintiff being desirous of having a similar policy effected for himself for 5000l., for deck cargo only, instructed Smith to obtain it for him. Smith, finding the underwriters were unwilling at the particular season to enter into a policy for deck cargo only, insured the goods in question by a declaration endorsed upon his own policy. Smith himself had no interest either in the ship or in the goods. This form of policy is well known. Whoever may turn out to be interested in the goods, with him the contract is made. An insurance is not like an ordinary contract, where the parties are known at the time. It was not necessary that Smith should have had instructions from the plaintiff at the time he effected the policy: it is enough if his principal subsequently ratified his act, by adopting the policy. [WILLES, J.—The question is, whether a person unascertained at the time of the contract can ratify it.] In the case of an ordinary contract, he could not: but insurance differs from every other species of contract. The policy in question was intended to cover deck cargo on this particular line of steamers. In

Lucena v. Crawford, 1 Taunt. 325, Commissioners were authorized by a commission granted in pursuance of a statute, to take into their possession ships and goods belonging to subjects of the United Provinces, which had been or might be detained in or brought into the ports of this kingdom, and to manage, sell, and dispose *of the same to the best advantage, according to such instructions as they should receive from the King in council: before [*761 any declaration of war against the United Provinces, one of His Majesty's ships took several Dutch East Indiamen, and carried them into St. Helena: the Commissioners, with the assent of the lords of the treasury, insured them at and from St. Helena to London: war was soon after declared against the United Provinces, and the ships were finally condemned as prizes to His Majesty, "as having belonged when taken to subjects of the United Provinces, since become enemies." Upon a loss happening, the Commissioners declared on the policy, and averred the interest to be in the King; and it was held that the action well lay. The objections which were there urged against the right of the Commissioners to recover, were, amongst others,—because a policy of insurance is a contract of indemnity, and therefore requires that the person on whose account it is effected should be interested at the time in the property insured; and because His Majesty, neither at the time when the risk commenced, nor when the policy was effected, nor at the period of the loss, had any interest in the ships and goods insured, whereon a valid insurance could be effected,—because the insurance was effected by the Commissioners as such, and as in their own right, under a supposed interest inherent in that character, and not on account of or on behalf of His Majesty,—and because the Commissioners, at the time when the insurance was effected, had not any authority to effect any insurance on account of His Majesty. But, notwithstanding these objections, the assured were held entitled to recover. *Routh v. Thompson*, 13 East 274, is an authority to the same effect. Lord El'enborough there says: "The insurance is not indeed made in terms in His Majesty's name; but it was made by the direction of *Sampson, who had been appointed agent by the captors [*762 for the prize: but the captors had no interest of their own in it, and therefore for their own benefit they were not competent to appoint an agent; they must, therefore, be taken to have appointed him as agent on the part of the Crown, whose servants and agents they were. Then Sampson writes the letter authorizing the insurance to be made, and therein he desires insurance to be made 'for my account.' That certainly was not intended as a direction to insure his own individual interest, but merely that credit was to be given to him for the premiums: and he proceeds to state that the insurance is to be made of the Danish vessel Knud Terkalsen, 'which had been detained by His Majesty's armed ship Duchess of Bedford, and for which he was authorized to act as agent.' There was no communication of the names of the particular persons for whose benefit the insurance was to be made: nor was it necessary that the agent should then know who they were; but it was to be effected in the name of the agent, for the benefit of those who should be concerned in interest: and the underwriters bound themselves to indemnify those who should appear to be interested in the prize, in case of loss: it must, therefore, enure for the

benefit of the Crown, which alone had any interest in the captured vessel." Policies of this sort have long been known. In *Marshall on Insurance*, 4th edit., by Serjt. Shee, 229, it is said: "There may be many cases where an assured may have an interest in the thing insured, but the amount of which it may be difficult or impossible for him to ascertain at the time when it is necessary to insure. As where returns are expected from abroad, of which the exact value, and even the nature, are uncertain: so, in the case of a prize, where the real value of it can only be ascertained when it is brought into port and *763] sold; and, in every instance where the owners have been prevented from receiving regular or satisfactory advices, from which the true amount of their interest might be ascertained." Again, p. 253, it is said: "It often happens, that, in the trade carried on with distant countries, particularly in time of war, it is uncertain by what ships goods may be sent from thence to Europe. It is, therefore, of great importance to the merchant to be at liberty, in such cases, to avail himself of the first vessels which may offer for that purpose, and to make his insurance on the goods on board such vessels; and in such case, the policy is upon the goods 'on board any ship or ships;' and this is now so well established, both by usage and authority, that the legality of it is indisputable. And an insurance in these terms will attach on goods loaded at any port within the limits of the voyage insured." In *Foster v. Bates*, 16 M. & W. 226,† one E. P., having sent a quantity of goods to Fernando Po for sale, died intestate, and, after his death, the defendants purchased the goods from the agent of the intestate there, who sold them for the benefit of the intestate's estate: subsequently to the sale, the plaintiff took out letters of administration to the intestate, and sued the defendants for the price of the goods: and it was held that the action was maintainable,—that the title of the administrator, though it did not exist until the grant of administration, related back to the time of the death of the intestate, so as to entitle the administrator to sue in assumpsit for goods sold and delivered,—and that, as the act of the agent was ratified by the plaintiff after he became administrator, it was no objection that the intended principal was unknown at the time to the person who intended to be the agent. [WILLES, J.—That does not hit the point I put,—whether the contract can enure for the benefit of a person who cannot be *764] ascertained *at the time. The same doctrine applies to the case of assignees of a bankrupt, whose title relates back to the act of bankruptcy, for the benefit of his estate, but not for its disadvantage: see *Hull v. Pickersgill*, 1 Brod. & B. 282 (E. C. L. R. vol. 5), 3 J. B. Moore 612 (E. C. L. R. vol. 4).] In *Foster v. Bates*, Parke, B., says: "Here, the sale was made by a person who intended to act as agent for the person, whoever he might happen to be, who legally represented the intestate's estate: and it was ratified by the plaintiff after he became administrator: and, when one means to act as agent for another, a subsequent ratification by the other is always equivalent to a prior command: nor is it any objection that the intended principal was unknown at the time to the person who intended to be the agent—the case of *Hull v. Pickersgill* being an authority for that position." In *Hagedorn v. Oliverson*, 2 M. & Selw. 485, where the plaintiff effected an insurance on ship as well in his own name as for and in the

name of all and every other person, &c., in the usual form, for the benefit of S., an alien enemy, and procured a license to legalize the voyage, and a loss happened, and two years afterwards S. by letter to the plaintiff adopted the insurance,—it was held that the plaintiff might recover against the underwriter, averring the interest in S. Lord Ellenborough there says: “The difficulty in this case arises from the situation of S., because he might, by refusing to adopt the policy in case the ship had arrived, have got clear of the premium, for if the plaintiff had brought an action against him to recover it, I do not see how he could have succeeded. That constitutes something of an anomaly, because, in one event, viz., that of a loss, he might secure himself, and nevertheless might have avoided the payment of the premium in the other event of the ship’s arrival, by declaring that he chose to stand his own insurer. But I do not think that *con- [*765 sideration governs the case now before us, between this plaintiff and the underwriter. The plaintiff had a right to effect an insurance, on the chance of its being adopted, for the benefit of all those to whom it might appertain; which are the words of the policy. He might insure for those who were actually interested, and possibly for those who might be interested. S. was interested, and might become privy to the benefit of this insurance by subsequent adoption, according to *Lucena v. Craufurd* and *Routh v. Thompson*. He has adopted it; and now it is made a question whether he can become privy to the benefit of it. It appears to me upon these authorities that he may, and may make use of the name of the person at the head of the policy as the person who had given the order to effect the insurance.”

Bovill, Q. C., and *Honyman*, in support of the rule.—Smith effected the policy in question upon his own account alone. He had had no communication with the plaintiff at that time upon the subject of an insurance upon his goods. The order given by the plaintiff was for a policy for 5000*l.* on deck-cargo only. Smith could not have effected such a policy at all. [KEATING, J.—Could Smith have sued?] Not in respect of these goods. The plaintiff is seeking to make a policy effected for a totally different purpose available to cover a risk which the underwriters on that policy never intended to take upon themselves. To enable him to ratify the act of Smith, he must show that that act was done on his behalf at the time. The cases of *Lucena v. Craufurd* and *Routh v. Thompson* have no bearing on this. In both the policy enured for the benefit of the party really interested at the time, viz., the Crown. In *Story on Agency*, § 251 *a*, it is said that “a ratification can only be effectual *between the parties, when [*766 the act is done by the agent avowedly for or on account of the principal, and not when it is done for or on account of the agent himself, or of some third person. This would seem to be an obvious deduction from the very nature of a ratification, which pre-supposes the act to be done for another, but without competent authority from him; and therefore gives the same effect to the act as if it had been done by the authority of the party for whom it purported to have been done, and as his own act. Hence it has been laid down as a maxim of the Canon law, ‘Ratum quis habere non potest, quod ipsius nomine non est gestum.’ The same rule was early recognised in the common law, and has been recently explained in the most satisfactory

manner." The authority there referred to is the judgment of Tindal, C. J., in the case of *Wilson v. Tumman*, 6 M. & G. 236 (E. C. L. R. vol. 46), 6 Scott N. R. 894, where that learned Judge says: "That an act done *for another* by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case, the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his *previous* authority. Such was the precise distinction taken in the Year Book 7 H. 4, fo. 35 [fo. 24, pl. 1].—that, if the bailiff took the heriot, claiming property in it himself, the subsequent agreement of the Lord would not amount to a ratification of his authority as bailiff at the time; but, if he took it at the time as bailiff of the lord, the subsequent ratification by the lord made him bailiff at the time. The same distinction is also laid down by *767] *Anderson, C. J., in Godbolt's Reports 109 (Anonymous).—If one have cause to distrain my goods, and a stranger, of his own wrong, without any warrant or authority given him by the other, takes my goods, not as bailiff or servant to the other, and I bring an action of trespass against him, can he excuse himself by saying that he did it as his bailiff or servant? Can he also father his misdemeanor upon another? He cannot, for, once he was a trespasser, and his intent was manifest." Reference is also made to the learned note by Serjt. Manning in that case. In an earlier section (§ 250), the learned author says: "Another consideration very important in cases of this sort, is that the principal cannot of his own mere authority ratify a transaction in part, and repudiate it as to the rest. He must either adopt the whole or none." It is not pretended here that the supposed ratification extended to the whole of Smith's policy. In *Vere v. Ashby*, 10 B. & C. 288, 298 (E. C. L. R. vol. 21), Parke, J., said: "The rule as to ratification applies only to the act of one who professes to act as the agent of a person who afterwards ratifies." And see *Bird v. Brown*, 4 Exch. 786,† *Howard v. Shepherd*, 9 C. B. 297 (E. C. L. R. vol. 67), and *Gerhard v. Bates*, 2 Ellis & B. 476 (E. C. L. R. vol. 75). For all the purposes of this policy, Watson was a perfect stranger at the time it was effected. Nobody's goods but Smith's were intended to be covered by it. At the time the policy was effected, Smith had no authority to act, nor did he profess to act, on behalf of Watson. The appropriation of it to cover Watson's goods was a fraud upon the underwriters. *Lucena v. Craufurd* and *Routh v. Thompson* are altogether distinguishable: in both the Crown was the party really interested, and the party on whose behalf the insurance was effected. In *Harman v. Kingston*, 3 Campb. 150, it was ruled by Lord Ellenborough, that, where there is a policy on goods as may *be there *768] after declared and valued, the declaration of the interest, to be available, must be communicated to the underwriters, or some one on their behalf, before intelligence is received of the loss. In *Hagedorn v. Oliverson*, the policy professed to be effected on behalf of Schroeder, and he adopted it. [ERLE, C. J.—It was intended for him at the time.] A man cannot ratify an act which does not purport to be done on his

behalf. There is nothing in the law or usages relating to insurance which take this case out of that general principle. In Arnould on Insurance, 2d edit., the learned author, after stating at p. 216 that the name of the ship in which the voyage is to be performed must be accurately specified in the policy, goes on, at p. 218, to say,—“Cases will frequently occur in the widely-extended operations of modern commerce, in which it may be utterly impossible, or would be highly injurious, to compel the party insuring to insert in the policy the name of the ship. A merchant who has ordered a consignment of goods from some distant port, may be very anxious to effect an *immediate* insurance on his merchandise, while he is utterly ignorant of the particular ship by which his foreign agent may be able to consign it: in time of war, when merchant vessels are obliged to take such opportunities of sailing as the varying fortunes of the hostile parties may chance to afford them, this uncertainty is of course increased to a very considerable extent. To compel the merchant, under such circumstances, to comply rigorously with the rule which requires the ship to be named in the policy, would be manifestly absurd; a relaxation, therefore, of the principle has in such cases been permitted by the laws or the practice of all maritime states, and the party effecting the policy is allowed to insure his goods ‘*on board any ship or ships*,’ on condition of declaring on the face of *the policy as soon as he becomes aware of it, [*769 and, if possible, before the loss, the name of the ship or ships on board of which they have actually been loaded. This mode of insuring, however, being an exception to the general rule, which requires the name of the ship in every case to be stated in the policy at the time of its subscription, can only be allowed in those cases in which the party effecting the insurance is *bonâ fide* and in fact ignorant of the name of the ship or ships by which the goods insured have been consigned.”

ERLE, C. J.—I am of opinion that this action cannot be sustained. It is an action of contract. It is important, therefore, not only to ascertain what is the subject of the contract, but who are the parties to it; for, it is clear law that no one can sue upon a contract unless it has been made by him, or has been made by an agent professing to act for him, and whose act has been ratified by him. Now, here, the contract was not made by the plaintiff; nor did it purport to be made on his behalf; it purported to be made by Smith on his own behalf. And it is clear that the plaintiff never intended to ratify that contract in toto, but part of it only, viz., so much of it as was sought to be appropriated to him by Smith. A very wide extension has been given to the principle I have adverted to as to the parties to a contract, in respect of policies of insurance, viz., that persons who could not be named or ascertained at the time the policy is effected are allowed to come in and take the benefit of the insurance. But then they must be persons who were contemplated at the time the policy was made. Here, however, Watson was not and could not be contemplated as being a party to whose benefit the policy should enure, at the time it was effected. The policy was effected by Smith in December, 1860. He was *not at that time employed by Watson. The first intimation he received from Watson that he wanted to effect an [*770 insurance, was received by him in January, 1861, when he was

requested to take out on his behalf an open policy for 5000*l.* against jettison on deck. Finding himself unable to effect such a policy as Watson required, he had recourse to the expedient of appropriating a part of his own contract to Watson. No doubt, the principle contended for on the part of the plaintiff is one of considerable importance to the mercantile community. But I am clearly of opinion that Watson cannot sue upon this policy. It may be that Smith might maintain an action as trustee for the parties really interested: but it will be time enough to consider that if the question should arise. No case can be found of a running policy having been appropriated to cover a risk not contemplated at the time. Such a proceeding is entirely unknown to the law of contract. With the consequences we have nothing to do, even though the effect of our decision should be to throw doubt upon the validity of running policies. The cases to which the learned counsel for the plaintiff have referred seem to me to be entirely in conformity with our present decision. In *Lucena v. Craufurd and Routh v. Thompson*, the prizes were vested in the Crown; the Crown, therefore, was interested in the policies, and substantially they were effected on the behalf of the Crown: in both, the very risk insured against was the risk in respect of which the action was brought. Here, it is quite certain that the underwriters did not undertake this risk; and that, if asked to do so, they would have refused. I therefore think, that, upon the declaration and the fifth plea, denying that the policy was made for the use and benefit or on account of the plaintiff, the defendant is entitled to judgment.

*771] *WILLIAMS, J.—I am entirely of the same opinion. I should be most unwilling to interfere with any mercantile usages or conveniences by the intervention of any artificial rule of law. But I think no mercantile convenience can justify us in holding that the plaintiff can sue upon this policy. For the reasons given by my Lord, I am clearly of opinion that we could not decide in favour of the plaintiff on the present occasion without overruling the general principle of the law of contracts, that no one can sue upon a contract unless it was made by himself or by some agent professing to act on his behalf.

WILLES, J.—I am of the same opinion. To entitle a person to sue upon a contract, it must clearly be shown that he himself made it, or that it was made on his behalf by an agent authorized to act for him at the time, or whose act has been subsequently ratified and adopted by him. The law obviously requires that the person for whom the agent professes to act must be a person capable of being ascertained at the time. It is not necessary that he should be named; but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by the contract. In the present case, the policy was effected on goods "to be valued and declared as interest might appear." No person was pointed out at the time the policy was effected as the person who was to be the owner of the goods insured. Smith was professing to act for himself at the time of making the policy. Goods shipped on his own account, or possibly by him as agent for another person, would be covered by the policy. But a stranger who had given him no orders to effect a policy for him clearly cannot by any supposed ratification assume the benefit

of the contract. The cases of administrators and of assignees of *bankrupts stand upon a totally different footing. The doctrine of ratification involves this, that the act of ratification [*772 shall have reference to the time when the act was done which the supposed principal professes to ratify. To illustrate our opinion, we may refer to the case of an ordinary policy. In the ordinary policy, the broker who effects it declares that he does so as well in his own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, &c.: and the person who sues upon it must be either the broker by whom it is effected or the person on whose behalf it was intended to be effected. No subsequently acquired interest will give a stranger a right to sue upon the policy. The case of *Powles v. Innes*, 11 M. & W. 10,† shows the course which ought to be taken where the interest of a third party intervenes. It was there held that a person who assigns away his interest in a ship or goods after effecting a policy of insurance upon them, and before the loss, cannot sue upon the policy, except as a trustee for the assignee, in a case where the policy is handed over to him upon the assignment, or there is an agreement that it shall be kept alive for his benefit. Parke, B., there says: "The plaintiff can only recover an indemnity. Then, what has this party lost, if he has sold his interest in the ship irrespective of the policy? Banks's interest is not protected, because she gave no authority to effect the insurance. Unless, therefore, there was some understanding that the policy should be kept alive for her benefit, the plaintiffs, suing on behalf of Page, have lost nothing. If the policy had been handed over with the bill of sale, or there had been an order to the brokers to hand it over, the case would be different; then the parties might sue as brokers for the purchaser: but we cannot infer that, no facts being stated *in the case to warrant such an inference." I do not [*773 think, that, in deciding as we are doing, we shall be doing any injustice or contravening the intention of the parties. It is necessary that underwriters should know with whom they are contracting. I decline to give any opinion as to whether or not a broker employed to effect insurances for several persons may join the whole in one policy, so as to enable each of the persons interested to maintain an action in respect of his several interest. It is not desirable to discuss a matter which is not now before the Court. It is enough to say that the defendant in this action is sought to be made responsible to a person with whom he has not contracted.

KEATING, J.—I also am of opinion that this rule should be made absolute. We have been very much pressed by Mr. *Brown* with mercantile usage and convenience, which he says should not be lightly disregarded. But, however desirous we may be to give every reasonable effect to mercantile usage, we cannot allow it to contravene any established rule of law. To give effect to the alleged usage here, if any such exists, would be to hold that a man may sue upon a contract which was not made by him or on his behalf. This clearly cannot be.

Rule absolute.

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*WAY v. HEARN. Jan. 27.

A., at the request of B., and on his promise that he would share any loss or liability he might thereby incur, accepted a bill at three months for the accommodation of C. At the maturity of the bill, C. being unable to meet it, it was agreed between the holders and A. and C. (without the knowledge of B.) that another bill should be drawn for the amount, in substitution of the former acceptance. A. having been obliged to pay the second bill, sued B. on his indemnity:—Held, that B's liability on his undertaking was not discharged by the renewal of the bill,—the parties not standing in the position of creditor and principal and surety.

THE first count of the declaration stated, that, in consideration that the plaintiff, at the request of the defendant, would lend his name to one Robert Read on a bill of exchange for 110*l.* payable three months after the 24th of October, 1859, that is to say, by the plaintiff accepting the said bill, the proceeds thereof to be applied in discharge of a certain amount then payable to the sheriff of Hampshire, the defendant undertook and promised the plaintiff to share with him any loss or liability which he the plaintiff might incur in respect of such bill; and that, although the plaintiff did then lend his name to the said Robert Read on the said bill, and then accepted the same for the purpose and on the terms aforesaid, and the proceeds of the said bill were applied in discharge of the said amount so payable to the said sheriff as aforesaid, and the plaintiff afterwards did incur a certain loss or liability in respect of the said bill, by being compelled to pay and paying the amount thereof, that is to say, 110*l.*, in discharge and in respect of the same, and all things had happened and been done and performed, and all times had elapsed which were necessary to have happened and to have been done and performed and to have elapsed, to entitle the plaintiff to have the defendant share with him the said loss or liability, and to be paid by the defendant one moiety of the said sum of 110*l.*, and to maintain this action, yet the defendant did not nor would share with the plaintiff the said loss or liability, or pay him a moiety of the said sum of 110*l.*, or any part thereof.

There was also a count for money paid and for money found due upon accounts stated.

*775] The defendant pleaded,—first, to the first count, *that he did not undertake and promise as therein alleged,—secondly, to the first count, that the plaintiff did not incur a loss or liability as in that count alleged,—thirdly, that before action the plaintiff's claim was satisfied and discharged by payment,—fourthly, to the first count, that the supposed promise in that count mentioned was obtained and procured from him by the plaintiff and one Robert Read in collusion with him by fraud and misrepresentation.

Fifth plea to the first count,—“as and for a plea on equitable grounds,”—that the defendant made the supposed promise in that count mentioned at the request of one Robert Read and in consideration that the said Robert Read should draw and the plaintiff should accept the said bill of exchange in that count mentioned, payable three months after date, as in that count alleged, and not otherwise; that the said bill of exchange, at the time it became due, was unpaid by the said Robert Read and dishonoured, and that the plaintiff, with notice of the premises, gave no notice of the dishonour of the said bill to the defendant; that thereupon, to wit, on the 21st of January, 1860,

and after the said bill became due as aforesaid, it was agreed by and between the plaintiff, the said Robert Read, and the joint stock banking company called the National Provincial Bank of England, the then holders of the said bill of exchange, for a certain good and sufficient consideration, without the defendant's consent or knowledge, in order to give the said Robert Read time for the payment of the amount due on the said bill of exchange in the first count mentioned for a certain period, to wit, until another bill of exchange thereafter mentioned should become due according to the tenor and effect thereof, and for and on account thereof, that the plaintiff should accept a certain other bill of exchange, to be drawn by the said Robert Read and *accepted by the plaintiff, bearing date the 30th of January, [*776 1860, for the amount of the first-mentioned bill, payable a certain time, to wit, four months, after the date thereof, to the said Robert Read or order; that, in pursuance of such agreement, the said Robert Read, without the consent or knowledge of the defendant, drew the last-mentioned bill of exchange, and the plaintiff, with knowledge of the premises, accepted the same in that behalf for securing the payment of the amount due upon the said bill of exchange in the first count of the declaration mentioned, and for and on account thereof; that the last-mentioned bill of exchange, so accepted by the plaintiff as last aforesaid, was delivered to and accepted by the said banking company, the holders of the bill in the first count of the declaration mentioned, for and on account of the said bill in that count mentioned, and all moneys due thereon, on the terms aforesaid; and by reason of the premises time was given to the said Robert Read to pay the bill in the first count of the declaration mentioned without the defendant's consent or knowledge; that the defendant did not at any time consent to, approve of, or ratify the said agreement so made between the plaintiff, the said Robert Read, and the then holders of the said bill in the first count mentioned, but was ready and willing, at the time the bill of exchange in the first count of the declaration mentioned became due and payable, to share with the plaintiff any loss or liability which the plaintiff might or should incur in respect of the last-mentioned bill of exchange; and that, after the bill of exchange in the first count of the declaration mentioned became due and payable as aforesaid, and before the bill of exchange secondly above mentioned became due and payable, the said Robert Read became a bankrupt, within the meaning of the statutes in force concerning bankrupts, and that *he [*777 was at the time of the commencement of this suit, and still is, an uncertificated bankrupt.

There was a further plea, to the residue of the declaration, of never indebted.

The plaintiff took and joined issue on all the pleas; and he also demurred to the fifth plea, the ground of demurrer stated in the margin being,—“that the facts alleged in the plea do not show that the defendant was in the position of a surety who was discharged by reason of time having been given by his creditor to the principal debtor, and discloses no answer in law to the declaration.” Joinder.

Holl, in support of the demurrer.(a)—The defendant was not in the

(a) The points marked for argument on the part of the plaintiff were as follows:—

“1. That the fifth plea does not show that the defendant was in the position of a surety who was discharged by time having been given by his creditor to the principal debtor:

position of a surety who was discharged by time given to the principal debtor. The original bill was drawn by Read: the plaintiff became the acceptor at the request of Hearn, the defendant. As between the plaintiff and Read and the defendant, the relation of creditor and principal and surety never *arose. It appears that the plaintiff *778] became surety at the request of the defendant. When Read made default in payment of the bill, the plaintiff was not in the position of a creditor, as against Read; nor could he be until he paid the bill. The plaintiff, having thus become surety for Read, became liable to pay the bill on Read's default, and the defendant became liable to contribute; but the plaintiff would have no right of action against Read, or claim on the defendant for contribution, until after he had paid the bill. As between the three, therefore, the relation of creditor and principal and surety never arose. [WILLES, J.—It is enough to say that the defendant's promise was an original promise to pay half what the plaintiff should become liable to pay on account of the bill.] 2. Upon the dishonour of the first bill, the plaintiff was not a creditor of Read, but a joint debtor with him to the holders of the bill, and therefore could not give time to Read. All he could and did do was, to consent to the holders giving time to Read. There are many cases which show that a creditor may give time to the principal debtor without prejudicing his right against the surety, provided he expressly reserves such right. It is so laid down in *Owen v. Homan*, 4 House of Lords Cases 997. [WILLIAMS, J.—So thought Lord Cranworth; but Lord Truro thought otherwise.] Lord St. Leonards, in *Wyke v. Rogers*, 1 De Gex, M'N., & G. 408, says that "all the cases prove, that, where an instrument is taken which might otherwise operate as a discharge of the surety, there will be no discharge if the remedies against the sureties are preserved." In *Byles on Bills*, 7th edit. 217, it is said: "It has been repeatedly held, and is now well established, that a discharge by the creditor to the principal debtor will not discharge the surety, if there be an agreement between the *779] creditor and the principal that the surety shall not *be thereby discharged, albeit the surety himself is no party to the stipulation; and the surety's remedy over against the principal is intact, whether the surety be or be not a party." The authorities referred to in support of that position are, *Burke's Case*, 6 Ves. 809 n., *Boulton v. Stubbbs*, 18 Ves. 20, *Ex parte Glendinning*, Buck B. C. 517, *Ex parte Carstairs*, Buck B. C. 560, *Harrison v. Courtauld*, 3 B. & Ad. 36 (E. C. L. R. vol. 23), *Nichols v. Norris*, 3 B. & Ad. 41 n., *Cowper v. Smith*, 4 M. & W. 519,† *Smith v. Winter*, 4 M. & W. 454,† *North v. Wakefield*, 13 Q. B. 536 (E. C. L. R. vol. 66), *Owen v. Homan*, 4 House of Lords Cases 997, and *Kearsley v. Cole*, 16 M. & W. 128.†

"2. That, at the time when the first bill was renewed, the plaintiff was a debtor upon such bill to the holder thereof, and had no right of action or claim against Read, and that he was not a creditor giving, but a debtor obtaining, time:

"3. That, in equity, the plaintiff and the defendant were in the position of joint sureties for the said Robert Read: that both therefore were equally bound to ascertain and see to the payment of the bill, and that the defendant, having neglected so to do, cannot now discharge himself from contribution, by showing that he had no notice of the dishonour thereof, or the plaintiff's consent to the renewal thereof:

"4. That it does not appear by the said plea that the defendant has been delayed or prejudiced by any act of the plaintiff."

And see *Davies v. Stainbank*, 6 De Gex, M'N., & G. 679, cited in *Pooley v. Harradine*, 7 Ellis & B. 437-440 (E. C. L. R. vol. 90). The right of suing the surety being reserved by the agreement, no fraud is committed, the surety having his right over against the principal. [WILLIAMS, J.—If the position of the surety is deteriorated, it is difficult to understand why the reservation of the creditor's right as against him should prevent his being discharged by time being given to the principal debtor.] The arrangement for the renewal of the bill could not prejudice or release the defendant. No time was actually given by the plaintiff to Read. He was in the position of a person himself obtaining time from the creditor. 3. If the defendant is to be treated as a surety, he and the plaintiff are in equity in the position of joint sureties. It was the defendant's duty to provide a moiety of the amount of the bill, on Read's failure to pay it. Having made default, he cannot complain of his co-surety having consented to postpone the day of payment. *Inf Dunn v. Slee*, Holt N. P. C. 399 (E. C. L. R. vol. 3), it was held, that, though time given to the principal will, under certain circumstances, exonerate a surety, yet time given to a surety without the privity of his co-surety, will not, upon his paying *the debt, affect his right of action for contribution against such co-surety. [WILLIAMS, J.—Is this a case of co-surety-ship?] In equity, it is submitted, it is.

Cooke, contra (a)—Substantially the fifth plea is a good answer to the first count of the declaration. The defendant made the promise stated in the first count solely as surety for Read: and by time given to Read without his privity and consent, the defendant was damnified, and consequently discharged from his suretyship. [ERLE, C. J.—Way does not give, he obtains time.] He goes behind the back of Hearn, and consents that time shall be given to Read, the principal debtor, for payment of the bill. Hearn's position is thus materially altered. His liability was as surety for Read, not on an original promise. It is not contended that time given to Read would have the effect *of discharging either Way or Hearn *at law*; but in equity it has. In *Greenough v. McClelland*, 30 Law J., Q. B. 15, it was held, that, if one maker of a promissory note signs as surety only for the other, and the payee has notice of this when he takes the note as security for money advanced to the principal, he cannot give time to the principal without the consent of the surety: if he does, the surety is discharged in equity, although the payee has never agreed to treat

(a) The points marked for argument on the part of the defendant, were as follows:—

"1. That the fifth plea is a good answer to the cause of action in the first count of the declaration:

"2. That the defendant made the promise in the first count as surety for and at the request and for the sole benefit of one Robert Read as the intended principal debtor, and not otherwise; that the defendant was to incur liability only in case Read, the principal debtor, failed to duly pay the amount of the bill of exchange mentioned in the declaration, and not otherwise; and that, after such bill became due, the defendant was discharged from his promise to the plaintiff by time having been given to Read, the principal debtor, and by an agreement having been made between Read, the plaintiff, and the then holder of the said bill, without the knowledge or consent of the defendant, whereby an alteration in Read's liability took place, and time was given to Read for the payment of the amount of the said bill, and whereby the defendant's remedies against Read were suspended:

"3. That the defendant's promise in the declaration was discharged by the plaintiff's act."

him otherwise than as a principal party liable upon the note, for, an equity arises from the relation of principal and surety and notice thereof to the payee; and, if the surety is sued upon the note after such time given, he may set up the defence by way of plea on equitable grounds. If, therefore Hearn had been a surety on the bill itself the agreement between the banking company and the principal debtor would clearly have discharged him, Way knew that Hearn was surety for the principal debtor, and therefore Way would have stood in the same position as the creditors, if Hearn had been a party to the bill. Hearn consented to guaranty or indemnify Way against a moiety of the loss, in the event of the dishonour by Read of a three months' bill. If on the happening of that event, Hearn had been called upon to contribute, he might have sued Read. Way, however, behind his back, enters into an arrangement whereby Hearn's hands are tied for four months longer. His position, therefore, is materially and prejudicially altered. If Way had not been party to the arrangement for renewing the bill, he would have been discharged. Hearn's liability to him would then have ceased. [WILLES, J.—Hearn's liability accrued directly upon the dishonour of the first bill.]

Holl, in reply, was stopped by the Court.

*782] *ERLE, C. J.—It is a well-recognised rule of law, that, if two persons are sureties for the performance of an act by a third on a given day, and time is given by one without the consent of the other, the latter is discharged. It is contended on the part of the defendant that the facts stated in the fifth plea bring this case within that rule. It seems to me, however, that the facts stated distinctly negative that relation between these parties. Read being in want of money, Hearn asks Way to be party to a bill at three months for the purpose of raising it, agreeing to share with him any loss or liability he might incur in the transaction. A bill is accordingly drawn at that date for 110*l.* by Read upon Way, which Way accepts upon the faith of Hearn's promise. The bill is not met at maturity by Read, and is in the hands of the National Provincial Bank of England. The plaintiff, Way, might have incurred loss, and Hearn would have been bound to recoup him as to a moiety, if the bank had pressed for immediate payment. But they give time to Read and to Way, without any communication with Hearn: and the question is whether this was a giving time to the principal debtor without the consent of the surety, so as to discharge the latter. So far from this arrangement operating to the prejudice of Hearn, it was manifestly for his benefit; for, it gave Read a chance of meeting the claim, and so exonerating both Way and Hearn from responsibility in respect of it. At all events, I am of opinion that the obtaining of time by Way for himself and Read for the benefit of Hearn, does not bring the case within the category on which the defendant rests his defence.

The rest of the Court concurring,

Judgment for the plaintiff

*WILSON v. HOLLINGS. Jan. 21. [*783

The Court set aside a judgment signed against a married woman (sued as a feme sole), but *without costs*, there being some doubt upon the affidavits whether she had not, when she contracted the debt with the plaintiff, held herself out as being unmarried.

FINLASON moved for a rule to set aside the judgment and all subsequent proceedings in this cause, with costs, on the ground that the defendant, to the knowledge of the plaintiff, was a married woman at the time of the issuing of the writ. A summons for the same purpose was heard before Byles, J., at Chambers, but he declined to make any order, referring the matter to the Court, with a stay of proceedings in the mean time. The affidavits upon which the motion was founded,—those of the defendant herself and of two other persons,—alleged that she was the lawful wife of one Charles Hollings, who was living (in India), and that she had never represented herself at any time to be other than a married woman; and one of the deponents swore that he had informed the plaintiff's agent before the goods in respect of which the action was brought had been supplied, that she was a married woman, and possessed separate property derived under the will of her first husband. He submitted that it was irregular to issue a writ against a married woman,—citing *Roberts v. Andrews*, 2 W. Bl. 720, 3 Wils. 124, and *Tidd's Practice*, 9th edit. p. 194. [ERLE, C. J.—The attorney could not know by instinct whether the party were married or single.] The fact being so, the writ is irregular, whether the attorney knew it or not. Knowledge can only be material in respect of costs. [ERLE, C. J.—If the fact be that the defendant is a married woman, it is clear that she should have relief. I think the justice of the case will be answered if the proceedings are stayed without costs. If the defendant is a married woman, the plaintiff cannot recover against her. The affidavits show a strong *prima facie* case of knowledge.]

**Sykes* showed cause in the first instance, upon an affidavit of the plaintiff's son, who swore that, in the course of the several [*784 interviews he had had with the defendant, she spoke of the income she derived under her "deceased husband's will," and that she never said anything to induce him to believe that she had a husband living. In *Partridge v. Clarke*, 5 T. R. 194, the Court refused to discharge a married woman from arrest, on common bail, where it appeared that she had obtained credit pretending that she was single. In *Luden v. Justice*, 1 Bingh. 344, 8 J. B. Moore 346 (E. C. L. R. vol. 17), this Court refused in an action against a feme covert, upon a summary application, to cancel the bail-bond, on the defendant's filing a common appearance, where much of the debt sued for was contracted before the defendant disclosed her coverture, where she had acted with duplicity, and at the time of the application was residing out of the jurisdiction of the Court. Park, J., there said: "This is an application to the discretion of the Court, and we must decide on all the circumstances of such a case as it appears before the Court. In the present, we think the defendant ought to be left to plead her coverture. The case of *De Gaillon v. L'Aigle*, 1 Bos. & P. 8, was much stronger than the present: there, the husband had given his wife a power of attorney

to transact his business, and himself went abroad. But the Court said they would not discharge the defendant, though the plaintiff was acquainted with the fact of her coverture: and, upon reference to *Waters v. Smith*, 6 T. R. 451, it appears the Court said in that case, that, where a married woman imposed upon a trader, and contracted on her own credit, they would not relieve her in a summary way. In *Pritchett v. Cross*, 2 H. Bl. 17, Gould, J., seemed to disapprove of the summary proceeding by motion, and of taking the fact of coverture from the defendant's affidavit, *and mentioned the case of Mrs. *785] Baddeley,—*Hatchett v. Baddeley*, 2 W. Bl. 1079,—where the Court were not satisfied with an affidavit, but put her to plead her coverture; and he said that he had always understood that such was the course both in the Queen's Bench and Common Pleas. In *Burfield v. The Duchess De Piennes*, 2 N. R. 380, the defendant had never represented herself as a single woman: and Heath, J., said, 'In *Deerly v. The Duchess of Mazarine*, 2 Salk. 646, where a verdict was found against the duchess, the Court refused to relieve her, though her coverture was clearly proved: and, if there be any case in modern times more recognised than another, it is that case.' We ought not to interfere in favour of the present defendant." If this be the proper mode of deciding such a question, the plea of coverture is useless.

Finlason, in support of his rule.—If the plaintiff knew of the coverture when the writ was issued, the defendant is clearly entitled to have it set aside. If it could be shown that the defendant had made any representation to induce the plaintiff to believe that she was unmarried, she would not be entitled to costs. In *Slater v. Mills*, 7 Bingh. 606 (E. C. L. R. vol. 20), 5 M. & P. 603, the defendant, a married woman, was arrested upon a bill of exchange which she had given for the education of children by a former husband. The plaintiff having been apprised of the second marriage, the Court discharged the defendant upon a summary application, although she had given out that she had property of her own, and that the bill would be duly paid. Tindal, C. J., in giving judgment, said: "In this case the fact of coverture is placed beyond dispute: and, if the parties went to trial on the plea of coverture, there could be no doubt of the result, so that *786] all the *intermediate expense of pleading would be thrown away. The marriage having been known to the drawer of the bill, the defendant is entitled to apply to the Court for her discharge: but, as she induced the party to receive the bill by [mis-]representations as to her means of payment, the rule must be absolute without costs."

ERLE, C. J.—It is extremely inconvenient at all times to discuss contested facts upon affidavit. But, upon all the affidavits here, I cannot avoid arriving at the conclusion that the judgment is irregular, and should be set aside. Although I am of opinion upon the affidavits that the defendant is a married woman, there is enough of peculiarity about the transaction to induce me, while I interpose to save the defendant from further useless litigation, to say that the judgment should be set aside and the proceedings stayed without costs.

The rest of the Court concurring,

Rule absolute accordingly.

***In the Matter of the Complaint of JOSEPH BAXENDALE and Others, carrying on Business under the Firm of PICK-FORD & CO., against THE BRISTOL AND EXETER RAILWAY COMPANY. Jan. 13. [*787]**

A railway Company permitted a carrier (who also acted as superintendent of their goods traffic) to hold himself out as their agent for the receipt of goods to be carried on their line, and his office as the receiving office of the Company; and goods were received by him at that place without requiring the senders to sign conditions which the Company required all other carriers who brought goods to their stations to sign:—Held, an undue preference, and the subject of an injunction under the 17 & 18 Vict. c. 21.

BOVILL, Q. C., in Trinity Term last, on behalf of Messrs. Baxendales, obtained a rule calling upon the Bristol and Exeter Railway Company to show cause why a writ of injunction should not issue against them pursuant to the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), enjoining the said Company to desist from giving undue or unreasonable preference to persons delivering goods to the said railway Company at Bristol, to be carried by the said railway Company on their railway, and from subjecting the complainants to undue or unreasonable prejudice or disadvantage in respect of goods delivered by them to the said Company to be carried by them on their said railway; and enjoining the said Company to receive from the complainants at Bristol goods to be carried on the said Company's railway without requiring them to sign the conditions referred to in the said affidavits, unless they require other persons to sign such conditions; and restraining the said Company from subjecting the said complainants in their trade of carriers from Bristol to any undue or unreasonable prejudice or disadvantage in any respect whatsoever in respect of the matters referred to in the said affidavits or some of them: and why the said railway Company should not pay the costs of and occasioned by the application.

The motion was founded upon the affidavits of Joseph Marston, the agent of the complainants at Bristol, of George Jones, porter to Messrs. Culverwell & Co., of Bristol, Manchester warehousemen, of John *Jones, porter to Messrs. Linton, Francis & Co. of Bristol, Manchester warehousemen, and of Arthur Williams, porter to Messrs. Waterman & Co., of Bristol, wholesale boot and shoe manufacturers. [*788]

The affidavit of Joseph Marston stated that the complainants were in the habit of carrying large quantities of goods for their customers from Bristol to Exeter and other places on the Bristol and Exeter Railway, delivering them for that purpose to the said Company at their railway station at Bristol; and that the Bristol and Exeter Railway Company refused to carry goods from Bristol to Exeter and other places as aforesaid for the complainants, unless the complainants would sign or cause to be signed a printed paper called a "forwarding note," which purported to be a request to the Company to "receive for transit, as per address and particulars on this note, the undermentioned goods, on the conditions stated on the other side." These conditions were as follows:—

"The Bristol and Exeter Railway Company give public notice,—First, that they will not be answerable for any article conveyed upon

their railway, unless it be entered and signed for as received by them, nor will they be responsible for the loss of or injury to any article or articles or property of the descriptions following, that is to say, gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the Governor and Company of the Banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, or of any foreign country, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver *789] plate or plated *articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them, contained in any parcel or package which shall have been delivered either to be carried for hire or to accompany the person of any passenger on their railway, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of 10*l*.

"Secondly, that they will not carry or allow to be carried upon their railway for any person, unless by special agreement, any aqua fortis, oil of vitriol, gunpowder, lucifer matches, or any other goods which in their judgment may be of a dangerous nature; and, if any person send by the railway any such goods, without distinctly marking their nature on the outside of the package containing the same, or otherwise giving notice in writing to the book-keeper or other servant of the Company with whom the same are left, at the time of so sending, he will be liable, by Act of Parliament, to a penalty of 10*l*, which will be strictly enforced, as will also the amount of damage sustained on any other goods by means of the aforesaid dangerous articles.

"Thirdly, that they will not, until further notice, undertake to carry upon their railway for any person, unless by special agreement, any boiler, cylinder, bob, or single piece of machinery, or single piece of timber or stone, or other single article, the weight of which shall exceed four tons.

"Fourthly, that they will not be answerable for the loss of or for damage to any goods arising from fire, civil commotion, tempest, or the act of God: nor for loss, detention, or damage of wrappers, boxes, or returned empties of any description, nor for any goods put into returned wrappers, boxes, or empties; nor for any goods left until *790] called for or to order, or left or *warehoused for the convenience of the parties to whom they are consigned; nor for the loss, detention, or damage of any package, insufficiently or improperly packed, marked, directed, or described, or containing a variety of articles liable by breaking to damage each other: nor for leakage arising from bad casks or cooperage, nor for damage to cast-iron work, furniture, or other goods of light construction. And they give notice that no claim for damage will be allowed, unless made within three days after the delivery of the goods, nor for loss unless made within three days of the time that they should be delivered.

"Fifthly, that no credit can be allowed, excepting by special arrange-

ment, but all goods must be paid for either previously to or at the time of delivery; and, if payment be refused, any charge for redelivery must be also defrayed, in addition thereto. If goods are refused to be received by the consignee, for any cause whatever, they will be carried back and redelivered to the consignor thereof, who will be required to pay the charge for such back-carriage and redelivery.

"Sixthly, that all goods, from whomsoever received, or to whomsoever belonging, shall be subject to a general lien, not only for the carriage of those particular goods, but also for any general balance that may be due by the owners or by the public carriers of such goods to the said Company; and that if in fourteen days after notice shall have been given that such goods are detained for any claim of the Company, and the money due be not paid,^(a) the goods will, at the discretion of the Company, be sold by auction to defray the Company's claims, and all expenses incurred thereon. But fish, fruit, and all other perishable articles will be disposed of at the discretion of the Company immediately after giving the above notice, and without awaiting the expiration of the above period of fourteen days.

"*Seventhly, that all goods addressed to places within the limits of the Company's local regulations for delivery of goods [*791 from the different stations on the railway, respecting which no directions to the contrary shall have been received, will be delivered by the Company at those places.

"Eighthly, that the delivery of goods will be considered to be complete, and the responsibilities of the Company will be considered to terminate, when the goods shall be unloaded out of the wagon, van, cart, or truck, and placed at the door of the consignee; and that the cellaring or warehousing of them will be at the owner's risk and expense; as also the removal of goods from the sender's premises into the agent's cart or wagon.

"Ninthly, that they will not under any circumstances be liable for loss of market or other claim arising from delay or detention of any train, whether in starting, or at any of the stations, or in the course of the journey. The Company do not undertake to send goods by any particular train, if there be an insufficient number of trucks at the station, or the trucks cannot be conveniently used for the purpose, notwithstanding the goods may have been taken to the station before the time appointed by the Company.

"Tenthly, that all goods addressed to consignees resident beyond the limits of the Company's local regulations for delivery of goods from the different stations on the railway, and respecting which no directions to the contrary shall have been received previous to arrival at the station, will be forwarded to their destination by public carrier or otherwise as opportunity may offer; or they will, at the discretion of the Company by whom they may have been received, be suffered to remain on the Company's premises, or be placed in shed or warehouse, if there be convenience for receiving *the same, pending [*792 communication with the consignees, at the risk of the owners, as referred to in clause No. 4. But that the charges of such carrier will be added to those of the Company, and the delivery of the goods by the Company will be considered as complete, and the responsibility

(a) *Sic.*

of the Company will be considered to have ceased, when such carriers shall have received the goods for further conveyance. And the Company hereby give notice that any money which may be received by them as payments for the conveyance of goods by other carriers beyond their said limits, will be so received only for the convenience of the consignors, for the purpose of being paid to such other carriers, and will not be received as a charge made by the Company upon the goods in the capacity of carriers beyond the extent of their own railway: and the Company hereby further give notice that they will not be responsible for any loss, damage, or detention that may happen to goods so sent by them, if such loss, damage, or detention occur beyond their said limits.

"Eleventhly, and in respect of all goods suffered to remain upon the Company's premises, or placed in shed or warehouse, or not removed from the Company's wagons, whether so remaining by direction of the consignor or consignee, or while awaiting an opportunity of further transmission, or until the consignee can receive the same,—the Company hereby give notice that such goods will, after forty-eight hours from their arrival (except bricks, ashes, coal, or coke, and suchlike mileage goods, which are to be chargeable from twenty-four hours after their arrival), be subject to a charge of 4s. per diem for demurrage, Sundays not included. Goods will be warehoused at a reasonable rate, at owner's risk; the goods, nevertheless, being so held by the Company at the risk as aforesaid of the consignors, consignees, or owners thereof.

*793] "Twelfthly, that the Company will not carry acids in carboys, baskets (light), boilers (iron), castings (light), chains, furniture, glass (plate), glass (stained), gunpowder, hats, iron (wrought and castings), jewellery, joiners' work, lace, lucifer matches, machinery, money, musical instruments, naptha in carboys, organs, pictures, picture-frames, prints or engravings, statuary, straw (manufactured), sulphuric acid, teazels, toys, turpentine in carboys, upholstery, vitriol in carboys, goods (light), except upon a special agreement, and at the risk of the owners.

"Thirteenthly, that the above conditions apply to all goods received by the above-named Company at all or any of their offices or warehouses, wherever situated; and, as to all goods intrusted to them, they will only agree to carry them subject to the above conditions and to all other the rules and regulations of the said Company.

"Fourteenthly, that the Company will not undertake, excepting by special agreement, to convey any less number at one time than three beasts, ten calves, fifteen pigs, or twenty sheep to any Bristol and Exeter station; and not less than three calves, six pigs, or ten sheep to any Great Western or South Devon station; nor will they convey cattle, pigs, or sheep in any number for a less distance than seventeen miles on their railway, except by special agreement. And they hereby give public notice that they will not be responsible for any loss, accident, or injury in respect of any animal conveyed upon their railway.

"Fifteenthly, goods conveyed at special or mileage rates must be loaded and unloaded by the owners or their agents, and the Company will not be responsible for any risk of stowage, loss, or damage, how-

ever caused, nor for discrepancy in the delivery as to either quantity, number, or weight, nor for the condition *of articles so carried, nor for detention or delay in the conveying or delivery of [*794 them, however caused.

"Sixteenthly, that they will not consent to carry any goods, unless at the time of their being delivered at either of their stations for conveyance a declaration or receiving-note be presented to the Company's clerk or officer of the station, setting forth the goods to be carried, according to their correct denomination, their weights and number, and the address of the party to whom the same are to be delivered. And, if any goods shall be untruly or incorrectly declared or described in any such declaration or receiving-note, so as to affect the rate to be charged for the carriage thereof, the Company will not be responsible for any loss or damage to such goods."

The affidavit then went on to state, that the deponent on behalf of the complainants objected to sign such papers; but that, as the defendants refused to receive or forward the complainants' goods unless the complainants or their servants signed the said papers, the deponent, on behalf of the complainants, and in order to prevent the stoppage of their trade, had been compelled to sign them or allow the complainants' porters to sign them on their behalf; and that the deponent was informed and believed that the Company did not require persons who delivered their goods at the Company's receiving-offices at Bristol to sign the said conditions, or any other conditions,—the Company's object being to induce persons to deliver their goods at the Company's receiving-offices instead of at their railway station, in order to get the profit of the cartage from such receiving-offices to their said station, and that there is a considerable profit to the complainants in the cartage of goods to the said station.

The affidavits of George Jones, John Jones, and Arthur Williams stated that the deponents had been *in the habit of delivering [*795 goods at the receiving-offices of the Bristol and Exeter Railway Company situate in High Street, Bristol, for the purpose of being carried to various places on the Bristol and Exeter Railway, and had never been required to sign any paper containing the conditions referred to in Marston's affidavit, or any other conditions.

The affidavits filed in answer to the application consisted of those of Henry Dykes, the traffic superintendent, William Harwood, the secretary, and John Barry Marwood, the chief accountant of the Bristol and Exeter Railway Company, and of James Cresswell Wall, described as a common carrier, and John Goodland, a clerk in his employ. The three former denied in general terms that any preference or advantage was given by the Company to any person over Messrs. Baxendale, that the Company were not in any way interested in nor had they any control over the office in High Street, Bristol, kept by Wall, and described as "the receiving-offices of the Bristol and Exeter Railway Company," but treated Wall as the "sender" of all goods coming to the railway from that office; and that the complainants, when bringing goods to the railway for carriage on the line, were not required to sign any conditions or to conform to any regulations which were not enforced against all other persons bringing goods there.

Wall's affidavit was to the following effect:—I carry on the business of a common carrier for hire in, amongst other places, the city of Bristol, and, in connection with my so carrying on such business, I have an establishment in High Street, in the city of Bristol, known as "The Universal Goods and Parcel Office and City Cloak Room." A portion of my business is, to receive at such establishment goods and parcels intended for transmission by the Great Western, the *796] *Midland, and the Bristol and Exeter Railways, and for shipment, and to cart the goods and parcels so received to railway stations or to the ship's side. I seek and obtain a profit by the cartage of the goods so received and intended for transmission by railway or for shipment. The sums received by me for the cartage of any goods intended for transmission to any station on the railway or branch railways of the defendants, are paid entirely by the owners of such goods, and not in any way directly or indirectly by the defendants. The defendants, in respect of any goods carried from and to any station on their railway or branches, make a railway charge from station to station which does not include any sum for cartage to or from such stations. The defendants do not in any way participate in the moneys so received by me for cartage; and, in respect of all goods carted by me to the Bristol station of the defendants' railway, I am required to send a forwarding note or special contract precisely similar in all respects to that required from the complainants; and damages and losses are settled between the Company and me upon the footing of the conditions of the said forwarding note. For the convenience of the public, and in order to protect them from excessive charges by carriers for the cartage of goods to and from the railway stations, it is the practice of railway Companies to arrange with parties to cart goods to and from the railway stations at moderate charges, not exceeding certain fixed rates, and to allow the parties so arranging to describe themselves as agents, and their establishments as receiving-offices of such Companies. I have heard and believe that the London and North Western and the Midland Railway Companies adopt this practice, and, having entered into some such arrangement with the complainants, allow them to describe themselves as agents, *and their *797] establishments as receiving-houses, of such Companies. The defendants adopt this practice, and have made an arrangement with me, under which I agree not to charge for the cartage of goods to or from the defendants' stations at (among other places) Bristol, more than moderate charges, not exceeding certain fixed rates; and *the defendants allow me to describe myself as agent, and my establishments, including the one in High Street, Bristol, as receiving-houses of the defendants*; and I do so describe myself and some of my establishments. The defendants have not anything whatever to do with my establishment in High Street, either as to expense, management, or in any manner whatsoever.

This was confirmed by the affidavit of John Goodland.

The rule having been enlarged, further affidavits were filed on both sides. On behalf of the complainants, John Marston, a clerk in their employ at Bristol, deposed that he had been in their employ as their sole agent at Bristol for five years; that, during the whole of such time, communications coming from the goods department of the Bris-

tol and Exeter Railway Company in respect of the complainant's business had been made by James Cresswell Wall, who acted as sole agent and manager of the Company for their goods traffic at Bristol and at all the other stations upon the line, and all letters written to the deponent on behalf of the Company in relation to the goods traffic had always been signed by Wall or by a clerk or servant in his employ on behalf of the said Company; that, in communicating as agent of the complainants with the Company, the deponent had never known or communicated with any other person as manager of the goods traffic on their line than Wall, and, whenever he had made verbal complaints to or inquiries of either Mr. Dykes, *who he [*798 believed was the superintendent of the passenger traffic only upon the line, Mr. Harwood, the secretary, Mr. Marwood, the chief accountant, or any other official of the Company, in respect of goods traffic, he had generally been referred to Wall, who thereupon acted on behalf of the Company: and that the deponent had been informed and believed that Wall employs and pays all the clerks and porters in the goods department of the Bristol and Exeter Railway Company, and that the control and management of the said department was left solely to Wall at Bristol and at all other stations on the line, and that he alone makes all arrangements for the receiving and forwarding goods.

The statements contained in the last-mentioned affidavit were corroborated by William Garton, a carrier at Bristol, John Parsons, a timber merchant, and others: and they were not controverted by the counter affidavits.

Kinglake, Serjt., and *Montague Smith*, Q. C., now showed cause.—The affidavits in answer to this application show distinctly that all goods received by the Company to be carried on their line are received subject to the same conditions as those exacted from the complainants. The only question therefore remaining, is, whether the receiving-house of Wall is the office of the Company. This is distinctly denied by the affidavit of Wall, and that of his clerk, Goodland. What gives rise to the ambiguity, is, that Wall acts for the Company in the capacity of superintendent of the goods traffic, as well as being an independent carrier. But his duties and liabilities in each character are totally distinct. [ERLE, C. J.—Suppose goods were burnt whilst at the receiving-office of Wall, against whom would the remedy of the owner be?] If against the *Company, Wall would be bound [*799 to indemnify them. [KEATING, J.—Do your affidavits show that the Company derive no pecuniary advantage from allowing Wall to hold himself out as their agent and traffic manager?] Not in distinct terms: but there is enough upon the affidavits to show that the Company do not participate in the profits derived from the cartage from the receiving-office in High Street to the railway station.

Bovill, Q. C., and *C. Pollock*, in support of the rule.—It is sworn, and not denied, that Wall is held out as the agent, and his office as the receiving-office, of the Company, and that he employs and pays all the clerks and porters connected with the goods department at all the stations on the line. No explanation being given of this, as between the public and the Company, the office in High Street must be assumed to be their office, or at all events they are estopped from

saying that it is not. At this office, then, the Company receive goods to be carried on their lines without requiring the consignors to sign the conditions which they impose upon the complainants. A delivery at the receiving-office of the Company is a delivery to the Company. A clear case of undue preference, it is submitted, is therefore made out, and the rule must be made absolute.

ERLE, C. J.—I am of opinion that the complainants are entitled to have their rule made absolute. The contest between the parties was one of fact, viz., whether Wall was the agent of the Company for receiving and forwarding goods on their line,—whether persons delivering goods at his office or receiving-house for that purpose had the security of the Company's liability or only that of Wall. It is clear *800] to all of us, that, if Wall was authorized by the Company to hold himself out as their agent, as between the consignors of the goods and the Company, the goods are received by the Company. The passage in Wall's affidavit, in which he says "the defendants allow me to describe myself as agent and my establishments, including the one in High Street, Bristol, as receiving-houses of the defendants," compels me to come to the conclusion that the Company are liable. The question is whether Wall was a carrier distinct from the Company, or really their agent for receiving and forwarding their traffic. Reading that passage, it seems to me that Wall's office is, as to third persons, to all intents and purposes the office of the Company, and that the effect of the arrangement was to give Wall an advantage over Messrs. Baxendale as to the carriage of goods which the law does not warrant. On that ground, I think the rule must be made absolute.

The rest of the Court concurring,

Rule absolute, with costs.

*801 DAWSON v. HARRIS and Another. Jan. 21.

In an action for the wrongful dismissal of a clerk, with a count for wages, the plaintiff obtained a verdict on the first count, and, no claim being urged on the second count, the verdict on that was entered for the defendants. A rule for a new trial was afterwards granted, "the plaintiff's costs of and occasioned by the trial already had, and of and occasioned by this application, to abide the event of this cause." On the second trial the defendants obtained a verdict on the first count, and the plaintiff (who had then discovered that there had been a mistake in the calculation of the wages due to him at the time of the dismissal) had a verdict on the second count, for 4*l.* 19*s.* :—

Held, that the event contemplated by the rule being the event in respect of which the contest took place upon the first trial, the plaintiff was not entitled to the costs mentioned in the rule.

THIS was an action against the defendants for the wrongful dismissal of the plaintiff, a clerk in their employ. Besides a count for the alleged wrongful dismissal, there was a count for money due to the plaintiff for wages.

The cause was tried before Erle, C. J., at the sittings in London after Trinity Term, 1859, when a verdict was found for the plaintiff, with 14*l.* 18*s.* 4*d.* damages, on the count for the wrongful dismissal, no claim being insisted upon on the second count, on which therefore a verdict was entered for the defendants.

In Michaelmas Term, 1859, the defendants obtained a rule calling upon the plaintiff to show cause why the verdict found for him should not be set aside and a new trial had, on the grounds of misdirection, surprise, that the verdict was against the weight of evidence, and for excessive damages. This rule was in the course of the same term made absolute, "the plaintiff's costs of and occasioned by the said trial already had, and of and occasioned by this application to the Court, to abide the event of this cause."

The cause was tried again at the sittings after last Trinity Term, when a verdict was found for the defendants on the first issue, and for the plaintiff on the second for 4*l.* 19*s.*, it having been discovered upon a closer investigation of the accounts that the defendants were indebted to him in that amount for wages.

In Michaelmas Term last, the plaintiff obtained a rule nisi for a new trial, on the ground of surprise. *This rule came on for argu- [*802 ment on the 20th of November last, and time was taken to consider; but, the Court being equally divided, the rule dropped. The verdict consequently stood for the plaintiff for 4*l.* 19*s.*

Griffiths, for the plaintiff, now moved that the master might be directed to tax and allow to the plaintiff his costs of the first trial. The 11th section of the 13 & 14 Vict. c. 61 (*a*) has no application here: the plaintiff is entitled to these costs under the words of the rule,—the event of the cause on the second occasion being in his favour. This may be likened to the case of a reference, where the costs are made to abide the event of the award, as in *Wigens v. Cook*, 6 C. B. N. S. 784 (E. C. L. R. vol. 95), and *Jones v. Jones*, 7 C. B. N. S. 832 (E. C. L. R. vol. 97).

ERLE, C. J.—I am of opinion that the plaintiff is not entitled to any costs. The declaration consisted of a special count for the wrongful dismissal of the plaintiff and a general count for work and labour. On the *first trial, no claim was made on the general count for [*803 work and labour, and on that there was a verdict for the defendants. But, upon the count for the alleged wrongful dismissal, there was a verdict for the plaintiff, with 140*l.* damages. In Michaelmas Term, 1859, the defendants obtained a rule nisi for a new trial on the grounds of misdirection, surprise, that the verdict was against the weight of the evidence, and that the damages were excessive. That rule was made absolute, and it was ordered that the plaintiff's costs of and occasioned by the trial already had, and of and occasioned by that application to the Court, should abide the event of the cause. Now, the obvious meaning of those words, is, the event in respect of which the contest took place at the trial and upon the argument of

(*a*) Which enacts, "that, if in any action commenced after the passing of this Act in any of Her Majesty's Courts of record, in covenant, debt, detinue, or assumpsit, not being an action for breach of promise of marriage, the plaintiff shall recover a sum not exceeding 20*l.*, or if in any action commenced after the passing of this Act in any of Her Majesty's superior Courts of record, in trespass, trover, or case, not being an action for malicious prosecution, or for libel, or for slander, or for criminal conversation, or for seduction, the plaintiff shall recover a sum not exceeding 5*l.*, the plaintiff shall have judgment to recover such sum only and no costs, except in the cases hereinafter provided [s. 12], and except in the case of a judgment by default [but see 19 & 20 Vict. c. 108, s. 19]; and it shall not be necessary to enter any suggestion on the record to deprive such plaintiff of costs, nor shall such plaintiff be entitled to costs by reason of any privilege as attorney or officer of such Court or otherwise."

the rule, and in respect of that which it was then supposed would be in contest upon the second trial. Upon that bargain the parties go down again, and the event so far as regards the matter which was before in contest is against the plaintiff. But upon the second trial the plaintiff had found out, that, upon a more accurate investigation of the accounts, a sum of 4*l.* 19*s.* was due to him for salary, and for this he obtained a verdict, the verdict being for the defendants upon the substance of the case, viz., the count for the alleged wrongful dismissal. The event, therefore, of the second trial was different from that of the first. It is true, the plaintiff gets a verdict on the second occasion : but that was not the event contemplated by the rule. I am, therefore, disposed to leave the rights of the parties where the law has placed them.

WILLIAMS, J.—I am entirely of the same opinion. The spirit and meaning of the rule was, that, if it should turn out that the rule ought not to have been granted, the plaintiff should have the costs of the first trial and of the argument; but that, if the event of the second trial justified the rule, he should not. The result of the second trial shows that the rule was justified, and consequently the plaintiff cannot have the costs of the first trial.

The rest of the Court concurring,

Rule refused.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

■

THE COURT OF COMMON PLEAS,

■

Hilary Vacation,

XXV. VICTORIA. 1862.

The Judges who usually sat in banco at these sittings were—

WILLIAMS, J.

BYLES, J.

WILLES, J.

KEATING, J.

OAKELEY v. MOHAMMED MUSEEH OODDEEN. *Feb. 6.*

A plaintiff is entitled to the same time for proceeding to trial after a rule made absolute for a new trial, as he had for proceeding to trial originally.

Consequently, where a rule had been made absolute for a new trial, and the plaintiff had gone down to try at the sittings after Michaelmas Term, but the jury, being unable to agree, were discharged from giving a verdict,—Held, that it was not competent to the defendant to take down the record for trial by proviso at the sittings after Hilary Term; the plaintiff not being in default.

INDERWICK, on the last day of last Hilary Term, moved for a rule calling upon the plaintiff to show cause why the defendant should not be at liberty to give notice for the trial of this cause at the sittings after term.

The affidavits upon which the motion was founded stated that the action was tried before the Lord Chief Justice at the sittings at Guildhall after Michaelmas Term, 1859, when a verdict on the material issues was *found for the defendant, leave being reserved to the plaintiff to move to alter the verdict or for a new trial: that [*806 a rule was accordingly moved for and made absolute for a new trial: that the plaintiff did not proceed to trial, and on the 6th of June, 1860, the defendant obtained a rule calling upon the plaintiff to show cause why he should not proceed to the new trial at the sittings after Trinity Term, 1860, which rule was opposed by the plaintiff, and discharged, the Court being of opinion that they could not compel a plaintiff to proceed to a new trial any faster than a plaintiff was capa-

ble of being made to proceed to the first trial of an original action: that, on the 30th of July, 1860, the plaintiff (for delay, as was surmised) obtained an order for a commission to examine witnesses at Calcutta, and for a stay of the proceedings until the first day of Easter Term, 1861; but the order was not drawn up until the 2d of November, 1860, and the commission was not sent out to Calcutta until the 3d of December, 1860: that, after the first day of Easter Term, 1861, the commission not having been returned, the plaintiff applied by summons to have the time for its return enlarged, but his application was refused, and thereupon the defendant's attorney on the 30th of April, 1861, gave the plaintiff's attorney a twenty days' notice to proceed to trial, whereupon the plaintiff's attorneys on the same day served a cross-notice of trial: that the cause was in the paper for trial on the 4th of July, 1861, but, a sufficient number of special jurymen not being in attendance, and the plaintiff's counsel declining to pay a tales, and the defendant's counsel abstaining from doing so in the belief that an offer of compromise which had been made would be accepted, the trial went off for want of a jury: that, the offer of compromise not having been accepted, the cause came on for trial before *807] Byles, J., *at the sittings after Michaelmas Term last, when the jury were discharged without being able to agree upon a verdict: that the defendant was recalled to India by his master, the King of Oude, in September or October, 1859, and has now been kept in this country for upwards of two years since his said recall, for the purpose of finishing this litigation, and his position and prospects in India have been seriously damaged by the delay in his return to that country, and his means have been exhausted by the heavy legal expenses he has had to bear in defending himself in this action, so that any further delay will amount to an absolute denial of justice to the defendant: that the defendant is a Mahometan, and a moulvie, which latter title or distinction is indicative of a man learned in the law and precepts of Mahomet, and requires from its possessor a stricter observance of the ceremonial of the Mahometan religion than is expected from an ordinary individual professing that religion; and that he could not return to India and be received into the society of his co-religionists and equals there, without first performing a pilgrimage to Mecca,—his long residence in a Christian country rendering such a proceeding absolutely necessary, and without which he would be generally avoided by all the devout believers in Mahomet: and that the pilgrimage to Mecca can only be performed at one period of the year, viz., about the end of the month of June, and therefore, in order that the defendant might perform such pilgrimage, it would be necessary for him to leave England not later than the month of May next.

He referred to a case of *Humpage v. Rowley*, 4 T. R. 767, where, upon a suggestion that the plaintiff wished to delay the trial, Gibbs moved that the defendant might be at liberty to carry the record *808] down to trial at the next assizes, observing that, by the *common law, the defendant could not carry it down by proviso; and the Court, thinking the application reasonable, granted a rule absolute in the first instance, saying that the plaintiff would not be damnified by it, for that, if he chose to take the record down himself, the costs of this application must be paid by the defendant. [WILLES,

J., referred to the notes to the case of *Dennis v. Dennis*, 2 Wms. Saund. 335.]

ERLE, C. J.—Upon the authority of the case of *Humpage v. Rowley*, 4 T. R. 767, I think the rule may be granted, and may be absolute in the first instance, notice being given to the plaintiff that he may apply on the first day of the sittings in banco after Term to rescind it, if he shall be so advised.

The rest of the Court concurring,

Rule absolute.(a)

Macnamara now moved to rescind the above rule.—The case of *Humpage v. Rowley* is no authority here. That was an issue out of Chancery, where the order directs the time and place of trial: Seton on Decrees, *2d edit. 509. Besides, in an issue out of Chancery, [*809 both parties are actors. This, however, is the case of an action brought in the ordinary way, the conduct of which, under certain well-known restrictions, is allowed by law to the plaintiff. In *Banks's Case*, 2 Salk. 652, 6 Mod. 245, 2 Ld. Raym. 1082, it is laid down, that, in civil actions, the defendant shall never carry down a cause by proviso, till there be a laches in the plaintiff, except in causes where the defendant is an actor. The case of *Humpage v. Rowley*,—the report of which is short and unsatisfactory,—came under the consideration of this Court in *The Staffordshire and Worcestershire Canal Company v. The Trent and Mersey Canal Company*, 5 Taunt. 577 (E. C. L. R. vol. 1), 1 Marsh. 218 (E. C. L. R. vol. 4), where it was held, that, after a new trial granted, the defendant cannot carry the cause down to trial by proviso until after the plaintiff has made default at an assize subsequent to the motion. Gibbs, C. J., there says: "The rule is established, that the defendant cannot carry a cause to trial by proviso till there has been a default of the plaintiff. The only case that comes near this is *Humpage v. Rowley*: but that was a peculiar case, on an issue out of Chancery. That was not, strictly speaking, a carrying down of the record by proviso: it was a special order, and only proves, that, where the plaintiff hangs back from carrying down a cause out of Chancery, which ought to be carried on, the Court will permit the defendant himself to carry down the record. If this were an authority for the use of trial by proviso, it would extend much too far: it would go to all cases. Certainly, there can be no judgment as in a case of a nonsuit in this cause: but the defendant is not without remedy; he may take down the cause by proviso, but he cannot do that until after the plaintiff has made default." The plaintiff has been guilty of no default here. He may be if he neglects to go to *trial at the next sittings: but he has the same time for pro- [*810 ceeding to trial after a rule made absolute for a new trial as he had in the first instance. And this equally applies to the case of a trial before the sheriff: *Harrison v. Sutton*, 12 M. & W. 307.† There

(a) The rule was drawn up as follows:—"Upon reading, &c., it is ordered that the defendant be at liberty to carry in the *Nisi Prius* record, and to enter the same for trial, and give notice of trial in this cause to the plaintiff for the sittings after this Term—the plaintiff to be at liberty, nevertheless, to apply to this Court at the sittings in banc to be holden on Thursday next, the 6th day of February, to rescind this rule, if he shall think fit: And it is further ordered, that, in the event of the plaintiff's giving notice of trial and proceeding to the trial of this cause at the said sittings, the defendant's costs of and occasioned by this application to the Court shall not be costs in the cause against the said plaintiff."

is no reason why the ordinary rule of practice should be departed from in this case. The only effect of this application can be to give the defendant's counsel an additional topic of prejudice to the jury.

Inderwick showed cause.—It cannot be doubted that the Court had power to pronounce the rule it did; otherwise the defendant never can take the cause down to trial by proviso in the ordinary way: *Phillips v. Dance*, 9 B. & C. 769 (E. C. L. R. vol. 17, 4 M. & R. 584. [WILLES, J.—There will be a default if the plaintiff does not proceed to try at the now sittings.] *Humpage v. Rowley* was followed by this Court in *Bassett v. Osborne*, 5 J. B. Moore 473 (E. C. L. R. vol. 16)(a) [BYLES, J.—There was no default in *Phillips v. Dance*.] The circumstance of the record being an issue out of Chancery does not preclude an application to the Judge at Nisi Prius to put off the trial: *Buxton v. Lawton*, 4 Camp. 163. [WILLIAMS, J.—You are in effect asking us to take from the plaintiff the control of the cause and give it to the defendant.] The defendant merely asks for a special order to prevent the delay and expense he will necessarily incur by having this action hanging over him for an indefinite period.

WILLIAMS, J.—I think this rule to rescind the former rule, which was issued improvidently, should be made absolute. It is clear that *811] there has been no *default on the part of the plaintiff: and, that being so, it is an established rule of practice that the defendant has no power to take down the record for trial by proviso, and consequently the order sought for by the defendant here could not be made without a manifest violation of that established rule. This matter was mooted as early as the reign of Charles the Second, in a case of *Dennis v. Dennis*, 2 Saund. 335, where, the defendant in error having taken down the record of Nisi Prius and proceeded to trial at the first assizes after issue joined, it was moved "that the postea should not be recorded, but that there should be a new trial:" and for matter in law it was urged "that the defendant had proceeded to trial before his time; for, it being the first assizes after issue joined, the plaintiff had liberty to proceed to trial or not at his election, and before he had made default the defendant could not have a trial by proviso." To this Serjt. Williams adds a note: "But this was not a trial by proviso," &c. "Nor, as it seems, was a trial by proviso necessary in this case; because it is holden, that, on an issue of fact in a writ of error, the defendant may carry down the cause to trial without a rule for trying it by proviso," &c. "It is however true, that, where the defendant proceeds to trial by proviso, he cannot do so until the plaintiff has been guilty of laches or default in not proceeding to trial when by the course and practice of the Court he ought to have done." The cases of *The Staffordshire and Worcestershire Canal Company v. The Trent and Mersey Canal Company* and *Phillips v. Dance* are also referred to. It is clear, therefore, that that is the rule; and it ought not to be violated. And it is not mere matter of practice, but of principle. The plaintiff is dominus litis, and has a right until he is guilty of some default to have the uncontrolled *812] government and dominion over the cause. It is *sought here to change the position of the parties in this respect. It cannot be done.

(a) That also was an issue out of Chancery.

WILLES, J.—I am of the same opinion: and I may add that the 116th section of the Common Law Procedure Act, 1852, recognises the rule as stated by my Brother Williams; for, it enacts that “nothing herein contained shall affect the right of a defendant to take down a cause for trial, *after default by the plaintiff to proceed to trial according to the course and practice of the Court.*” That is an express legislative recognition of the existing law. As to the power of the Court to allow the defendant to give notice of trial and to carry the record down for trial where by the practice of the Court he cannot do so by proviso, I have yet to learn that such a power exists. In the case of *The Queen v. Banks*, there could be no default, and consequently no trial by proviso. There, Sir Joseph Banks was indicted at the quarter sessions in Berks, and the indictment was moved to the Queen’s Bench by the prosecutor, and both prosecutor and defendant made up the record, took out process, and carried down the cause to trial at the assizes; and the defendant put in his record first, tried it, and was acquitted. The prosecutor moved for and obtained a new trial: and, in giving judgment, the Court say: “In civil actions the defendant shall never carry down a cause by proviso, till there be a laches in the plaintiff, except in causes where the defendant is as a plaintiff, as, in replevin, prohibition, quare impedit (against the patron only), which are to have return, consultation, and the writ to the bishop. There can be no trial by proviso in a cause of the Crown, because there can be no default nor laches, nor can the Crown be compelled to try any cause by *Nisi Prius*,” &c. It is clear, therefore, that even adopting Mr. *Inderwick’s* view as to the *form of the application, the defendant is not entitled to the assistance of the Court, [*813 unless he can show a default on the part of the plaintiff. Where he cannot have a trial by proviso directly, he cannot have it indirectly.

BYLES, J.—I am of the same opinion. The application was made to me at Chambers; but I did not think it a case in which I ought to interfere. When the parties to a cause are at issue, the plaintiff has a right to rest on his oars until by the course and practice of the Court he is compellable to proceed. Where a new trial is ordered he is in the same position as to proceeding to a second trial as he was when issue was first joined. He must be guilty of a default before the defendant can interpose in the way suggested.

Rule absolute, the plaintiff’s costs of and occasioned by this application to the Court to be (his?) costs in the cause in any event.

***THE GREAT CENTRAL GAS CONSUMERS COMPANY** [*814
v. CLARKE. Feb. 6.

The price to be charged for gas supplied to the Metropolis (as well as the quality) is regulated by the Metropolis Gas Act, 1860, 23 & 24 Vict. c. 125.

Where, therefore, a gas company under their private Act were limited to a charge of 4s. per 1000 cubic feet for gas of such a quality as to produce from an argand burner of a given size a light equal in intensity to the light of twelve wax candles of six to the pound:—

Held, that, on the coming into operation of the public Act, under which they were compelled to supply gas of a considerably better quality, the company were justified in increasing the charge to any sum within the maximum authorized to be charged by that Act.

THIS was an action brought by the plaintiffs against the defendant for the recovery of 11*l.* 4*s.* 5*d.*, and by consent and under an order of a Judge according to the Common Law Procedure Act, 1852, the following case was stated for the opinion of the Court without any pleadings:—

1. The city of London is supplied with gas by three companies,—The Chartered Company, The City Gas-Light Company, and the Great Central Gas Consumers Company.

2. The Chartered Company was established in 1809, and was regulated by the following Acts of Parliament, viz., the 50 G. 3, c. 163, 54 G. 3, c. cxvi., 56 G. 3, c. lxxxvii., 59 G. 3, c. xx., and 4 G. 4, c. cxix.

3. The City Gas-Light Company was established in 1817, under the 57 G. 3, c. xxiii., and is regulated by the 22 & 23 Vict. c. lii.

4. The Great Central Gas Consumers Company was established in 1849, and regulated under the 14 & 15 Vict. c. lxix., passed in 1851.

5. The districts of these Companies are defined in the map mentioned in the 6th section of the Metropolis Gas Act, 1860, 23 & 24 Vict. c. 125, and, with that of the Commercial Company, include the whole city.

6. These Acts and the tracing from the said map, which accompanied the case, were to be referred to as part of the case.

7. The standard of illuminating power mentioned in s. 23 of the Great Central Company's Act of 1851 (viz. twelve wax candles) was at the time the Act passed deemed and taken to be and is in fact equal to 10.41 sperm candles of 120 grains, and not more.

*815] *8. Under and in accordance with the provisions of the said Act, the Great Central Company did from and after the time when the same came into operation, and until the 29th of September, 1861, produce and supply to their consumers common gas above the said standard, and sometimes above and sometimes below an illuminating power of twelve sperm candles of 120 grains, at and for the rate and price of 4*s.* per 1000 cubic feet, save in the case of any special contract.

9. In June, 1859, the Great Central Company made and entered into a contract with the Commissioners of Sewers of the city of London, being the local authority of the said city, to supply the public lamps within the jurisdiction of the Commissioners for three years from the 24th of June, 1859, which contract was made and existing before the 1st of January, 1860, and at the time of the passing of the Metropolis Gas Act, 1860.

10. From and after the making of the said contract, the Company in accordance therewith, until the 29th of September, 1861, supplied the Commissioners and their other customers with gas above the standard fixed by their Act of 1851, and sometimes above and sometimes below an illuminating power of twelve sperm candles of 120 grains.

11. On the 1st of January, 1860, and from thence until the 29th of September, 1861, the rate taken and charged by the Great Central Company for gas was 4*s.* per 1000 cubic feet.

12. Before the 2d of September, 1861, viz., on the 1st of September, 1861, the plaintiffs and the other two companies elected to adopt the provisions of the Metropolis Gas Act, 1860, relating to price, purity,

and illuminating power of gas, as from the 29th of September, 1861 pursuant to the provisions of the said Act.

13. Having so elected, the chairman of the said *three Companies, on the 2d of September, 1861, with the authority of the [*816 directors of the said Companies, signed and sent to their customers the following circular:—"The legislature having, after full inquiry, passed an Act for regulating the supply of gas to the Metropolis, requiring under heavy penalties a greatly increased standard of illuminating power and purity, which will necessarily involve an increased cost of production, we beg to inform you that the Companies supplying the city of London with gas will on and after Michaelmas next be brought under the provisions of that Act, and that the future charge will be at the rate of 4s. 6d. per 1000 cubic feet for the ordinary coal-gas."

14. Such circular was sent by the plaintiffs to the defendant, and received by him on the 2d of September, 1861.

15. On and after the 29th of September, 1861, the plaintiffs, in pursuance of the Metropolis Gas Act, 1860, and their election to adopt it, have manufactured and supplied their customers with gas of and above the standard of purity and illuminating power of the common gas required by the said Act of 1860, and no other, viz., twelve sperm candles of 120 grains, and contend that they are entitled to charge at or for the rate or price of 4s. 6d. per 1000 cubic feet.

16. The standard fixed by the said Act is higher than the standard fixed by the Great Central Company's Act of 1851.

17. The production and supply of gas of the standard required by the Act of 1860 involves an increase in the cost thereof over and above the cost of production and supply of gas of the standard fixed by the Act of 1851, which may be taken for the purpose of this case at 3d. per 1000 cubic feet.

18. The defendant, who occupies premises in the *city of London, and within the plaintiffs' district, has on and since [*817 the 29th of September, 1861, consumed by meter 31,800 cubic feet of gas to December 18th, 1861, manufactured by the plaintiffs of and above the standard purity and illuminating power of common gas required to be supplied by the Act of 1860. The plaintiffs have charged him 4s. 6d. per 1000 cubic feet for such gas. He contends that they cannot charge more than 4s. per 1000 cubic feet. The defendant has paid for such gas at the rate of 4s. per 1000 cubic feet; and the only question in dispute is, whether the plaintiffs are entitled to charge more than 4s. per 1000 cubic feet.

The question for the opinion of the Court was, whether the plaintiffs were entitled to charge 4s. 6d. per 1000 cubic feet for common gas consumed by meter, of and above the purity and illuminating power required by the Metropolis Gas Act, 1860, supplied to the defendant since the 29th of September, 1861; and whether the plaintiffs were not precluded from demanding and receiving more than 4s. per 1000 cubic feet, by the 24th section of their Act.

If the Court should be of opinion that they were so entitled, and were not so precluded, judgment was to be entered for the plaintiffs for 15s. 10d. and the costs of suit on the higher scale. If the Court

should be of the contrary opinion, judgment was to be entered for the defendant, with costs as aforesaid.

Sir F. Kelly, Q. C. (with whom was *Lush, Q. C.*), for the plaintiffs.^(a)—The question for the determination of the Court in this case depends upon the construction to be put upon a few sections of the Great Central Gas Consumers Act, 1851 (14 & 15 Vic. c. lxix.), and the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125). By the 23d section of the former the quality of gas to be supplied by the Company is defined, and by s. 24 the price is limited. The 23d section enacts "that all gas supplied by the Company shall be of such quality as to produce from an argand burner having fifteen holes and a seven-inch chimney, and consuming five cubic feet of gas per hour, a light equal in intensity to the light produced by twelve wax candles of six in the pound burning 120 grains per hour, and such gas shall be superior in purity to the gas in common use supplied at or about the 7th day of December, 1849, by any of the Companies who then lighted the city of London or any part thereof with gas." And s. 24 enacts "that it shall not at any time be lawful for the Company to demand and receive from any person or corporation who shall use or burn gas manufactured or purchased and

(a) The points marked for argument on the part of the plaintiffs, were as follows :—

"1. That the 24th section of the plaintiffs' Act of 1851 does not apply to the gas of higher quality which the Act of 1860 compels the plaintiffs to supply :

"2. That the Act of 1851 is a parliamentary contract for the supply of gas of a specified quality at a specified price; and that the 23d and 24th sections should be construed together and with the recitals :

"3. That the Act of 1860 is another parliamentary contract for the supply of a commodity in some respects different and more expensive to produce, and upon different conditions, and at a different price :

"4. That one object of the Act of 1860 is, to place the Companies to which it relates on an equality with respect to the provisions of the Act, as is shown by the recitals 'that the regulations to which those Companies are subject are not uniform, and it is expedient that provision be made for the due regulation of all Companies and persons supplying gas within the Metropolis;' and that this object would be defeated if the price fixed by the plaintiffs' Act of 1851 applied to the gas required by the general Act of 1860 :

"5. That s. 14 of the Act of 1860, which makes it compulsory upon the gas Company in the case thereby provided for to supply the consumer with gas at the rate prescribed by the Act, is inconsistent with the price fixed by the Act of 1851, applying to the gas supplied under the Act of 1860 :

"6. That s. 19, which enables gas Companies to contract subject to the provisions of the Act of 1860, is inconsistent with the continuing application of s. 24 to the Act of 1851 :

"7. That s. 36 of the Act of 1860 is also inconsistent with the defendant's contention; and that the provisions of the Act as to price, purity, and illuminating power are assumed as of course applying together to the Company adopting the Act :

"8. That the plaintiffs have adopted the Act under this section, and are by its terms entitled to the benefit of all its provisions :

"9. That s. 35 of the Act of 1860 is inconsistent with the defendant's view; by prohibiting Companies from charging more than the price fixed by the Act, it authorizes them to charge as much :

"10. That s. 40 of the Act of 1860 assumes that 4s. 6d. per 1000 cubic feet is a reasonable price for gas of the purity or illuminating power required by the said Act, and that the necessary effect of this Act would be to advance the price to that sum; and it must be assumed that the legislature fixed the limit upon satisfactory evidence of the cost of producing gas of the purity and illuminating power fixed :

"11. That a provision in the Act relating to the subject-matter does not apply to a different subject-matter added by another Act of Parliament, although the Acts may in some respects be in *pari materia*, unless it is reasonable and right that it should do so; and it is neither reasonable nor right that a provision as to price made by the legislature with reference to the cost of producing gas of one quality should apply to a gas of a quality more expensive to produce required to be made by a subsequent Act of Parliament."

supplied by the Company, either for public or private use, and used by the meter, any sum exceeding the rate of 4s. per cubic feet of such gas." Under the Act of 1860, the quality of gas which all Companies are bound to supply is purer, viz. equal to twelve *sperm* candles. The question is, whether the price to be charged, as well as the quality of the gas to be supplied, is not now regulated by the latter *Act. It is submitted that the plaintiffs are no longer bound by the price limited in the private Act. The object of the [*820 Metropolis Gas Act, 1860, was, to introduce one uniform system of regulations as to quality and price to govern all the Companies supplying gas to the metropolis. The preamble states that "whereas the following gas Companies (naming several, the plaintiffs amongst the number) or some of them are respectively incorporated under the authority of Parliament for the purpose of supplying several districts of the metropolis with gas, and the said Companies, instead of supplying gas by several mains in the same district, have agreed, as far as possible, each one to confine its supply to a separate district, in order to economize capital and avoid the too frequent opening of the public streets, and, subject to the provisions and restrictions of this Act, it is expedient that such districting should receive the sanction of Parliament; and whereas the regulations to which those Companies are subject are not uniform; and whereas it is expedient that provision be made for the due regulation of all Companies and persons supplying gas within the metropolis." The Act then proceeds to assign districts to the several Companies, by s. 6. The 14th section enacts, that "every gas Company from time to time supplying gas within any district shall, as to any premises or street within such district not already supplied with gas, and which shall lie within fifty yards of any existing mains, at their own expense, on being required by the owner or occupier of any premises within the district or in part within the district, who shall contract for not less than two years to pay gas-rates in respect of such supply to an amount equal to 20 per cent. upon the outlay, provide and lay all proper and sufficient communication, service, and other pipes up to the premises of such owner or occupier, to communicate *with the gas Company's mains, and shall, if so required by [*821 the owner, occupier, or local authority, furnish him or them, at the rate prescribed by this Act, with a supply of gas for the purpose of being used in or on the premises, or for lighting the street, and, if so required by the owner or occupier, furnish him with one or more meters for ascertaining the quantity of gas consumed: provided that the gas Company shall not be bound to supply more than one meter for each consumer occupying a separate dwelling or apartment, nor any meter exceeding a five-light meter: provided also that the meter rent which the said Company shall be entitled to claim for such meter shall not exceed 10 per cent. on the net cost of such meter: provided also that it shall not be lawful for any Company not charging a meter rent on the 1st of January, 1860, to charge such rent within their district until after the 1st of January, 1862." The 35th section enacts, that, "after the 31st of December, 1860, no gas Company shall, except under existing contracts, demand or take for any gas or five-light meter supplied by them any sum of money exceeding the rate or

meter rent by this Act authorized." It is clear, therefore, that the price was to be regulated by the general Act. [WILLES, J.—Was 4s. per 1000 cubic feet the limit for all the Companies?] No: the charges were various. (a) The City of London Gas Company were limited to 5s. The object of this Act was to secure uniformity of quality and equality of price. The 19th section enacts, that, "subject to the provisions of this Act, every gas Company from time to time may enter *822] into any contract *with any owner, occupier, or local authority, for all or any of the following purposes, that is to say, for supplying him or them with gas, and with pipes, burners, meters, lamps, lamp-posts, and other apparatus, and for the repair and cleansing and for the lighting and extinguishing thereof, in such manner and on such terms and conditions as the parties agree." The 40th section enacts that "no Company shall advance the price of gas above the rate taken by such Company on the 1st of January, 1860, whenever such rate is at or above 4s. 6d. per 1000 cubic feet, unless there has been such increase in the cost of gas, or any other circumstance affecting the Company, as will warrant such advance: Provided always, that, before raising the gas-rate in any district, the gas Company supplying such district shall give notice of their intention to the local authorities of the district and in some newspaper circulating within the district, for two consecutive weeks at least one month before such alteration in the gas-rate shall be made; and, in case any local authority shall within such month dissent from such alteration, it shall be determined by arbitration in the manner hereinbefore [s. 38, mentioned whether such alteration shall be allowed: Provided always, that no gas Company shall charge for common gas supplied by them any sum exceeding 5s. 6d. per 1000 cubic feet, or for cannel gas any sum exceeding 7s. 6d. per 1000 cubic feet; provided also that any Company shall be at liberty to change the kind of gas from time to time supplied by such Company, whether common or cannel gas, on giving three months' notice of their intention so to do; and, upon the expiration of such notice, the Company shall thenceforth supply gas pursuant thereto under the provisions of this Act until any like notice shall be given for a further change; and, when the Company shall *823] change the supply from cannel gas to *common gas, the rate shall be reduced so as not to exceed 4s. 6d. per 1000 cubic feet except under the circumstances and in the manner hereinbefore set forth." The effect therefore of the 23d and 24th sections of the 14 & 15 Vict. c. lxxix., and the 19th and 40th sections of the 23 & 24 Vict. c. 125, is this, that, in future, no gas of a lower standard of purity than that prescribed by the last-mentioned Act shall be supplied, and that those Companies who have hitherto charged less than 4s. 6d. per 1000 cubic feet, may now charge any sum they can agree for up to 5s. 6d. per 1000 cubic feet, but that those who have hitherto charged 4s. 6d. per 1000 cubic feet or upwards shall charge 4s. 6d. and no more, unless there is such increase in the cost or other circumstances to warrant an advance; and that in no case shall the price exceed 5s. 6d. "This is not mere matter of implication or inference, it is a

(a) The Acts regulating the Chartered Gas-Light Company contained no provision limiting the Company as to price: neither did the 57 G. 3, c. xxiii., the Act regulating the City Gas-Light Company.

express provision that the gas shall be supplied upon such terms and conditions as the parties agree: s. 19. It is this Act of Parliament and this alone which is to regulate and govern all contracts for the supply of gas to the Metropolis. The 21st section enacts that "no contract for any of those purposes" (that is, the purposes mentioned in s. 19) "shall contain any term or condition contrary to any of the provisions of this Act," &c. By s. 22, the supply of gas to the street lamps is made compulsory. The 25th section, which regulates the quality, enacts that "the quality of the common gas supplied by any gas Company shall be, with respect to its illuminating power at a distance as near as may be of 1000 yards from the works, such as to produce from an argand burner having fifteen holes and a seven-inch chimney, consuming five cubic feet of gas an hour, a light equal in intensity to the light produced by not less than twelve sperm candles of six to the pound, each burning 120 *grains an hour, and the [*824 quality of cannel gas supplied by any gas Company shall with respect to its illuminating power at the distance aforesaid be such as to produce from a bats-wing or fish-tail burner consuming five feet of gas per hour a light equal in intensity to twenty such sperm candles; and each such gas shall with respect to its purity be so far free from ammonia and sulphuretted hydrogen that it shall not discolour either turmeric paper or paper imbued with either acetate or carbonate of lead, when those tests are exposed to a current of gas issuing for one minute under a pressure of five-tenths of an inch of water, and shall not contain more than twenty grains of sulphur in any form in 100 cubic feet of gas: Provided that any gas Company, and the local authorities of the district supplied by such Company, shall be at liberty to agree upon any other or different test by which to ascertain the purity of the gas, or to vary the amounts of ammonia or sulphur in any form hereinbefore allowed; and thereupon the Company shall be thenceforth liable to have the purity of their gas tested in the manner so prescribed." If the Company are to supply this greatly superior quality of gas, surely it would require express words to impose upon them the burthen of supplying it at the price at which they before supplied the inferior description of gas. The 36th section may be material for one purpose. By that section all existing contracts for the supply of gas, made before the 1st of January, 1860, with any local authority, are to determine on the 1st of February, 1862,—“provided that from the time of the passing of this Act until the said 1st of February, 1862, the provisions of this Act relating to price, purity, and illuminating power of gas, shall not apply to any such Company, unless such Company shall elect to adopt them.” The plaintiffs have elected to adopt the provisions of the Act, and [*825 *therefore they are within that clause. That section, coupled with the 37th and 40th sections already adverted to, clearly shows that the legislature contemplated that all new contracts should be regulated entirely by this Act, as well as to price as to quality of the gas to be supplied. The plaintiffs having adopted the Act, are entitled to charge the additional price, and consequently are entitled to judgment upon this special case.

The Recorder of London (with whom were *Bovill, Q. C., C. Pollock,*

and *Ogle*), for the defendant.(a)—The provision as to the price to be charged for the supply of gas by this Company is still, it is submitted, regulated by the 24th section of the 14 & 15 Vict. c. lxix., which remains wholly untouched by the general enactments of the Metropolis Gas Act, 1860. That statute never contemplated that there should be uniformity of price among all the Companies mentioned in its preamble. It would have been unjust to enforce that, seeing that the expense of distribution must vary with the nature of the district supplied. The standard of illuminating power fixed by the 25th section of the Act of 1860, had already become the common *826] *standard: gas of that quality was required to be supplied by the City of London Gas-Light and Coke Company (one of the Companies mentioned in the preamble), by the 18th section of their Act, 22 & 23 Vict. c. lii., and the price to which they were limited by s. 17 was 5s. per 1000 cubic feet for common, and 7s. for cannel gas. The Companies who were parties to the Act of 1860 get a great benefit in return for the restrictions imposed upon them, by the division of the city into districts and the consequent avoiding of competition. But there is nothing in the Act to warrant the notion that uniformity of price as well as of quality was meant to be enforced, although the legislature were well aware that there were important variances in the prices charged by the different Companies. The only section to be found in the Act which deals with price is the 40th: and all that that section says upon the subject of price, is, that "no Company shall advance the price of gas above the rate taken by such Company on the 1st of January, 1860, when such rate is at or above 4s. 6d. per 1000 cubic feet, unless there has been such increase in the cost of gas or any other circumstances affecting the Company, as will warrant such advance." This does not justify this Company in increasing their price. They had not the power to increase it before the passing of that Act; neither have they now. The 40th section contains this proviso,—“Provided always that no gas Company shall charge for common gas supplied by them any sum exceeding 5s. 6d. for every 1000 cubic feet, or for cannel gas any sum exceeding 7s. 6d. for every 1000 cubic feet.” The inconsistency of the argument on the part of the plaintiffs upon this section is, that, while Companies which were before charging 4s. 6d. per 1000 cubic feet or more are precluded from any increase in their charge, this particular Company, which before *827] charged *4s. only, may now charge any price they please up to 5s. 6d. per 1000 cubic feet. Anything more unjust or unreasonable it would be difficult to conceive. [BYLES, J.—What do you understand by the expression in the 14th section, that the Company shall be under an obligation to furnish gas to anybody “at the rate

(a) The points marked for argument on the part of the defendant were as follows:—

“1. That the plaintiffs were not entitled to charge the defendant more than 4s. per 1000 cubic feet, being limited to that price by the 24th section of the Great Central Gas Consumers Act, 1851:

“2. That the Metropolis Gas Act, 1860, does not repeal or override the provisions of the Great Central Gas Consumers Act, 1851, except in so far as the provisions of the earlier Act are inconsistent with those of the latter Act; and that the 24th section of the Great Central Gas Consumers Act, 1851, is not thus inconsistent:

“3. That the Metropolis Gas Act, 1860, contains no provisions which entitle the plaintiffs to charge at the rate of 4s. 6d. per 1000 cubic feet.”

prescribed by this Act?"] There certainly is not any definite rate prescribed by the Act.^(a) The City of London Gas Company are empowered by their special Act, 22 & 23 Vict. c. lii., s. 17, to charge 5s. If the argument on the part of the plaintiffs is well founded, that provision is now repealed. The real question is, whether there is anything in the Act of 1860 which repeals the 24th section of the 14 & 15 Vict. c. lxix. In *Dwarris on Statutes*, p. 604, it is laid down, that "it is generally to be taken that the legislature only meant to modify or repeal the provisions of any former statute in those cases where such its object is expressly declared." Now, can it be said that the legislature has anywhere declared in the Metropolis Gas Act, 1860, its intention to repeal the 24th section of the 14 & 15 Vict. c. lxix.? The learned author goes on to say,—“It is always to be presumed that the legislature, when it entertains an intention, will express it, and that, too, in clear and explicit terms.” It is not pretended that there is any such clear and explicit declaration of intention here. Then, is there any necessary implication to that effect? The words “necessary implication” have received an interpretation in a very elaborate judgment of Vice-Chancellor Wood in the case of *Re The London and Eastern Banking Corporation*, 27 Law J., Ch. 457, [*828 461, n. (s. c. 4 Kay & J. 273), where that learned Judge says: “No doubt it would be a sound principle of construction to say necessary implication (that is, an implication which admits of no other construction when you put the two or three clauses together) might be in some cases equivalent to an express enactment.” [WILLIAMS, J.—The 24th section of the 14 & 15 Vict. c. lxix. is utterly irreconcilable with the 14th section of the 23 & 24 Vict. c. 125 as to gas to be supplied to premises not already supplied; because the words of the former are general, that, in no case shall the Company charge more than 4s. per 1000 cubic feet, whereas by the latter they are to take “the rate prescribed by this Act.”] What is the rate prescribed by the Act? Certainly not in s. 19, nor in s. 40. The former applies only to special agreements: and the latter has already been shown not to apply to this case. In *Middleton v. Crofts*, 2 Atk. 650, 675, Lord Hardwicke says: “The rule touching the repeal of laws, is, *leges posteriores priores contrarias abrogant*: but subsequent Acts of Parliament in the affirmative giving new penalties, and instituting new methods of proceeding, do not repeal former methods and penalties of proceeding ordained by preceding Acts of Parliament, without negative words. Besides, a later Act of Parliament hath never been construed to repeal a prior Act, without words of repeal, unless there be a contrariety and repugnancy between them, or at least some notice taken of the former law in the subsequent one, so as to indicate an intention in the law-makers to repeal it.” So, in *Comyns's Digest*, *Parliament* (R. 9, a.), it is said: “A later statute, general and affirmative, does not abrogate a former which is particular: as, the statute 5 Eliz. c. 4, that none use a trade without being apprentice, does not take away 4 & 5 Ph. & M. c. 5, that no weaver use, &c. R. 6 Co. 19, b. *(*Grogory's Case*).” In *Mahony v. Wright*, 10 Irish Common Law [*829

(a) *The Recorder* afterwards stated that he had obtained a copy of the bill as originally introduced, and that contained a provision that the rate of charge should be 4s. per 1000 cubic feet for 12 sperm candle gas, and 5s. for gas of a higher quality.

Rep. 420, 426, Lefroy, C. J., after an elaborate review of the authorities, says: "It is settled by authority that the recital of an intention merely, in a subsequent statute, will not operate by implication to repeal a former specific statute, and that, in order to effect such a repeal, there must be a clause of repeal in the repealing statute. It is also quite settled, that mere general words in a subsequent affirmative statute, not referring expressly to a former specific statute, are not sufficient to repeal such former statute, if the two statutes can stand together." There can be no difficulty in holding that these two statutes may stand together. There is no hardship in compelling the Company to supply the better quality of gas at the price they before charged for the inferior gas, seeing the great benefits they derive under the Act of Parliament.

Sir Fitzroy Kelly, in reply.—The proposition advanced on the other side as to the necessity of express words in a later statute to repeal a former statute, is subject to this qualification, viz., that, if the provisions of the later Act are directly inconsistent with those of the former, the former Act is repealed. It is submitted that the 24th section of the 14 & 15 Vict. c. lxix. is altogether inconsistent with the 19th and 40th sections of the 23 and 24 Vict. c. 125. The contract which the Companies are by the 19th section authorized to make for the supply of gas, are to be "subject to the provisions of *this Act*," not to the provisions of the 14 & 15 Vict. c. lxix. The combined effect of the 19th and 40th sections, is, that the Company may charge more than 4s. per 1000 cubic feet, provided they do not exceed 5s. 6d. The "rate prescribed by this Act," is, whatever price between these limits the parties may mutually agree upon. The Company is not to *830] charge *more than 4s. 6d. per 1000 cubic feet, if that has been the limit of its price before the passing of the Metropolitan Gas Act, 1860: but, no matter what has been the price charged or the quality of the article supplied, in future the quality shall be that pointed out in s. 23, and the price that limited by s. 40. This construction does not require the Court to draw any inference or make any conjecture: it merely calls upon them to construe the exact words of the Act of Parliament. [WILLES, J.—The Company are to be limited to a dividend of 10 per cent.: see 14 & 15 Vict. c. lxix., s. 23.] That is another mode of limiting the price to be charged to the consumer. And this was the only practical limitation down to the passing of the Act of 1860. By s. 41 of the 23 & 24 Vict. c. 125, the Companies are required to furnish accounts to the home secretary. The 13th section of the Gasworks Clauses Act, 1847, 10 & 11 Vict. c. 13, is almost in terms identical with the 19th section of this Act. The 36th section is not unimportant: it enacts that "all contracts made or existing before the 1st of January, 1860, between any of the gas Companies included in this Act and any local authority, for or relating to the supply of gas, shall terminate on the 1st of February, 1862, and thereafter the provisions of this Act in all particulars shall apply to such Company: provided that, from the time of the passing of this Act until the said 1st of February, 1862, the provisions of this Act relating to price, purity, and illuminating power of gas, shall not apply to any such Company, unless such Company shall elect to adopt them." Here, the Company has elected to adopt the Act, and therefore is

bound by all the provisions of the Act as well in relation to price as to purity and illuminating power. The supply must be at "the rate prescribed by this Act," whatever that rate may be. [BYLES, J.—How do *you deal with the suggestion of the *Recorder* that [*831 there would be an absurdity in saying, that, if the Company charged 4s. 6d. or more on the 1st of January, 1860, they cannot under any circumstances increase the charge, but that, if they charged less than 4s. 6d. on that day, they are at liberty to go up to 5s. 6d. per 1000 cubic feet? If it is a substantive enactment, it seems very absurd; and if, as the *Recorder* suggests, it is a proviso, it is equally absurd. WILLES, J.—Possibly that absurdity may be avoided by treating the next proviso as being general, and by compelling the Company, before any advance is made to 4s. 6d. or otherwise, to take the steps pointed out in the proviso, by notice. If the charge is 4s. 6d., they must show a change of circumstances to justify the increase: if it is under that sum, then it falls within the general proviso, and they must give notice of the alteration: and, if that is considered unjust, recourse may be had to arbitration, under s. 38.] It is perfectly clear, that, under this Act of Parliament, some Companies are limited to 4s. 6d., while others may charge up to 5s. 6d. for the same sort of gas: and, if there be any absurdity or inconsistency in this, recourse must be had to the legislature to cure it.

WILLES, J.—This is a case in reference to the importance of which and the desirability of the speedy decision of which the Court was induced to take it out of its turn and allow it to stand first among the cases for consideration at the present sittings: and the same reasons which induced the Court to accede to the application of the parties for that purpose, also induces them to think, that, if they feel that they have arrived at a clear opinion upon the construction of the Act of Parliament, they ought at once to announce that opinion, and not to hamper the proceedings which either party may think proper to take elsewhere by any delay in *giving utterance to that opinion. We have arrived at an opinion, in which my Brother Williams [*832 concurs.

The question arises in this way,—It appears that the gas supplied to the Metropolis is supplied by several Companies, many of which competed with one another, especially upon the boundaries of the districts chiefly supplied by them. These Companies were governed by Acts of Parliament which were not uniform or consistent in their provisions. With regard to the matter more immediately under our consideration, viz., the price to be charged for the gas supplied, there was considerable discrepancy. Some of the Companies,—as in the case of the Company who are the plaintiffs on this occasion,—were obliged to supply gas of a certain quality at a certain price, viz., 4s. per 1000 cubic feet. Another Company was obliged to supply gas of a superior quality at a higher price, viz., 5s. per 1000 cubic feet. Other Companies had no prescribed limit as to quality or price; and the gas supplied by them was supplied, like any other article coming into the market, at the price it would fetch, or at the price which in particular instances the Companies might be able to obtain from the persons with whom they contracted. There was therefore an absence of uniformity as well in price as in quality. Before the passing of the

Metropolis Gas Act, 1860, the Companies supplying the Metropolis appear to have agreed that it would be desirable as far as possible to cease their ruinous competition with each other, and that each Company should, as far as could be arranged, confine itself to a given district. This arrangement was sanctioned by the legislature. But it was far from being the only object which the Act of Parliament had in view. It is impossible to look at the recitals without seeing that the regulations to which these Companies were subject were not uniform at the time *833] the Act passed, and that it was one of the objects of the legislature to make them so. Looking at the fact that several of these Companies supplied to one and the same district that which has now become almost a necessary of life, it was to be expected that the legislature in dealing with them would endeavour to make the regulations affecting that district uniform as to all the Companies. One provision of the Act is remarkable. In the first place, it makes a general provision with respect to the kind of gas which is to be supplied by all the Companies coming within its regulation: and it provides for the production of two descriptions of gas, one of which is called common gas, the other cannel gas, which is a gas of a superior quality and character. Now, the first of these sorts of gas was that which formed the standard of excellence in one or more of the Acts of Parliament which affected Companies other than the Company who are the plaintiffs in this case: but that was a standard beyond that which the plaintiffs' Company were required to attain in the gas which they supplied, and for which under the Act of 1851 they were authorized to charge the sum limited by that Act. I refer to the 25th section of the Metropolis Gas Act, 1860, and the 23d and 24th sections of the plaintiffs' Act, 14 and 15 Vict. c. lxix. Here is, therefore, first of all a standard introduced which is a different and a higher standard than that which existed in the Act of 1851, and the expense of production greater than that of the gas required to be supplied under that Act. You have, then, a common provision as to the sort of gas which is to be supplied by all the Companies, and you have the fact that the gas to be supplied is a more expensive article than that which was supplied by these plaintiffs under their Act of Parliament. To say the least of it, it is not unreasonable to expect to find a general *834] provision as to price for all the Companies, or that this Company should be authorized to charge in respect of the superior article which they are now compelled to supply a higher sum than they before charged for the inferior article under their own Act. No doubt these gas Companies acquire, as the learned *Recorder* has suggested, considerable benefits by coming under the operation of the general Act. Amongst other benefits, they acquire a more advantageous use of their capital, by escaping a wasteful competition with one another. But it must be remembered that that is a benefit which originated with themselves, and resulted from their mutual arrangement which the Act of 1860 only countenanced and sanctioned; and this consideration in no degree detracts from the remark I before made, that there is nothing unreasonable in saying that more should be charged for the supply of a better article. Then, we have under the Act of 1860 a class of persons who are unquestionably to be governed by the provisions of that Act. I mean those persons who

are mentioned in the 14th section: the Companies are bound to supply them with gas "at the rate prescribed by this Act." We now come to the consideration of the 40th section, with three lights thrown upon its construction,—first, the reasonableness of charging a higher price for a better article, and the unreasonableness of requiring the Company to limit their charge to 4s. per 1000 cubic feet equally for common gas and for cannel gas,—secondly, the fact that general provisions are made with respect to several Companies, and that some at least of those Companies must be governed by the 40th section only,—thirdly, that, with respect to the class of persons coming under s. 14, their rights must certainly be governed by that section: and there is also the fact that no substantial distinction has been pointed out between the case of *those persons and the case of persons who were [*835 supplied previously to the passing of the Act. I have in vain endeavoured to discover any reason why a preference should be given to the persons supplied under s. 14 over those who were supplied before. If any could be suggested, it would have been pointed out to us by the *Recorder*.

We now come to the material section,—s. 40. That section enacts that "No Company shall advance the price of gas above the rate taken by such Company on the 1st of January, 1860, whenever such rate is at or above 4s. 6d. per 1000 cubic feet, unless there has been such increase in the cost of gas, or any other circumstances affecting the Company, as will warrant such advance." And there is a proviso "that no gas Company shall charge for common gas supplied by them any sum exceeding 5s. 6d. for every 1000 cubic feet, or for cannel gas any sum exceeding 7s. 6d. for every 1000 cubic feet." That, as it seems to me, is the provision which must govern the dealings of these Companies from and after the passing of the Metropolis Gas Act, 1860: and, if that be so, it is inconsistent with the 24th section of the 13 & 14 Vict. c. lxix.

I do not assent to the proposition quoted from Dwarris on Statutes, that, in order to effect a repeal of a former Act, the later or repealing Act must contain express words. If that be the proposition which that learned author means to lay down, it clearly is not accurate. It is enough if there be words which by necessary implication repeal it. Now, it is a necessary implication, that, if the Company are to charge sums not exceeding 5s. 6d. for every 1000 cubic feet of gas A., or 7s. 6d. per 1000 cubic feet of gas B., gas C. not being supplied at all, that is a provision which is practically and in terms inconsistent with the provisions of the 14 & 15 Vict. c. lxix. Is there *any [*836 absurdity in that construction, or any reason why that proviso in the 14th section of the Metropolis Gas Act, 1860, should be inapplicable to the present case? Upon much consideration, I am satisfied there is no such absurdity. I certainly did at one time incline to think that it would be absurd that the Companies who on the 1st of January, 1860, charged at the rate of 4s. 6d. per 1000 cubic feet for their gas should be precluded from raising that rate unless there has been such increase in the cost of gas, or other circumstances affecting the Company, as should warrant such an advance, and that other Companies who on that day charged, like this Company, less than 4s. 6d. per 1000 cubic feet for their gas should be at liberty at once to

raise the price to 5s. 6d. But, although that does appear to be so when you read the first six lines of the section, I think it will appear not to be so when you read the proviso which immediately follows.—“Provided always, that before raising the gas-rate in any district, the gas Company supplying such district shall give notice of their intention to the local authorities of the district, and in some newspaper circulating within the district for two consecutive weeks at least, one month before such alteration in the gas-rate shall be made; and, in case any local authority shall, within such month, dissent from such alteration, it shall be determined by arbitration in the manner hereinbefore mentioned whether such alteration shall be allowed.” That proviso is applicable generally, as it appears to me, to the case of any Company raising its rate, whatever that rate may have been upon the 1st of January, 1860: if that rate was then 4s. 6d. per 1000 cubic feet, it is not to be raised unless the circumstances can be shown which are referred to at the beginning of the section: whatever it may have been, it is not to be raised without notice, *837] *and not then, if upon a reference to arbitration,—which, upon the best consideration I can give the Act, appears to me to be a reference to the inspector to be appointed under the 7th section, and whose award is to be carried into effect in the manner pointed out in ss. 7 to 10 inclusive,—it shall appear that the raising of the price is unreasonable. If it were proposed to raise the rate beyond 4s. 6d. per 1000 cubic feet, the arbitrator would doubtless look to the legislative declaration at the beginning of the section, and would not allow the rate to be raised beyond 4s. 6d. per 1000 cubic feet, unless there had been either a general rise in the cost of gas or some other circumstances affecting the particular Company which would warrant an advance of price. That appears to me to reconcile the whole matter,—this proviso, awkwardly, no doubt, introduced into the middle of the section, operating for the purpose I have mentioned. Then follows a proviso which seems to me strongly to confirm this view of the matter. It is, “Provided always that no gas Company,”—that is, none of the Companies mentioned in the preamble,—“shall charge for common gas supplied by them any sum exceeding 5s. 6d. for every 1000 cubic feet, or for cannel gas any sum exceeding 7s. 6d. for every 1000 cubic feet; provided also, that any Company shall be at liberty to change the kind of gas from time to time supplied by such Company, whether common or cannel gas, on giving three months’ notice of their intention so to do; and, upon the expiration of such notice, the Company shall thenceforth supply gas pursuant thereto under the provisions of this Act until any like notice shall be given for a further change; and, when the Company shall change the supply from cannel gas to common gas, the rate shall be reduced so as not to exceed 4s. 6d. per *838] 1000 cubic feet, except under the circumstances *and in the manner hereinbefore set forth.” This clearly is general, and applicable to all the Companies; and it would be absurd, as applicable to this Company (the plaintiffs), if 4s. was to be the maximum charge for each species of gas; for, to be of any validity, the argument on the part of the defendants must undoubtedly go to that length.

Having paid the best attention I could to the various provisions of these Acts of Parliament, and to the able arguments which have been

addressed to us, I am quite satisfied that the construction I have put upon them is the true one, and that the plaintiffs are entitled to the increased rate charged.

BYLES, J.—I am of the same opinion. I must confess that from a very early stage of the argument I inclined to think that the plaintiffs were entitled to succeed, although I was for a short time embarrassed by the able argument of the learned *Recorder*. I apprehend that one of the authorities cited,—and, indeed, a higher authority cannot be cited (a)—lays down the true rule, or rather one of the alternatives of the true rule, as to the effect of a subsequent upon a prior Act of Parliament, viz., that, though in the subsequent Act the prior Act is not expressly mentioned, the prior Act is repealed, if there be an invincible contrariety or repugnancy between the two. Now, the question here is, whether any one can read the 23d and 24th sections of the 14 & 15 Vict. c. lxxix., without seeing that they must be repealed by the Metropolis Gas Act, 1860. The 23d section authorizes the supply of gas of an inferior quality. The 25th section of the Metropolis Gas Act, 1860, altogether prohibits the *supply of gas of [839 that inferior quality. That alone seems to me to dispose of the argument that the 23d and 24th sections of the private Act are unaffected by the provisions of the general Act. If it were not so, we must arrive at this conclusion, viz., that a Company would be compelled by the tyranny of an Act of Parliament to supply a very much superior and more expensive article at the same price which they were before authorized to charge for the inferior and less expensive article. That being so, one would naturally look to see whether or not any new rate of charge is introduced into the general Act. A comparison of the several sections, and the observations of Sir *Fitzroy Kelly* upon them, induced me to suspect that there must have been in the bill as originally introduced a scale of charges. Though I do not at all form my opinion upon that, it seems that that suspicion was not altogether unfounded. The 14th section speaks of “the rate prescribed by this Act,” and there is another clause which, though not in the same language, is just as express, viz., the 36th, which relates to the determination of existing contracts, and which contains a proviso, that, “from the time of the passing of this Act until the 1st of February, 1862, the provisions of this Act relating to price, purity, and illuminating power of gas, shall not apply to any such Company” (that is, any of the gas Companies included in that Act), “unless such Company shall elect to adopt them.” I took the liberty of asking the learned *Recorder* where those provisions were to be found: but he could only refer me to the 40th section. I apprehend, therefore, though it is not necessary to decide that question, that the provisions of the 40th section are a substantial enactment, as much as the original clauses would have been, as to the price to be charged for gas. There is such a provision in the Act of Parliament; and it is *no- [840 where to be found but in section 40. I confess I was, like my Brother Willes, very much bewildered by the provision, that, where a Company had before charged at or above the rate of 4s. 6d. per 1000 cubic feet, it should not charge an increased rate under this Act; but

(a) Referring to the judgment of V. C. Wood in the case of *In re The London and Eastern Banking Corporation*, 27 Law J., Ch. 457, 461, n., 4 Kay & J. 273.

only requires the delivery of a bill for *the bringing of an* therefore, though an attorney cannot bring an action on has been delivered a month, that circumstance is not able him to *set it off*. But he must not produce it at surprise: it is sufficient in such case to deliver the bill for the plaintiff to have it taxed before the trial." For author refers to Hooper v. Till, Martin v. Winder, and Bul-Birkett. [He was stopped by the Court.]

ALLIAMS, J.—I am of opinion that this is a perfectly good set-off, that the defendant is entitled to judgment on these demurrers. notwithstanding the case of *Murphy v. Cunningham*, 1 Anst. 198, which certainly *appears to be a case in point in support of the replication, I may say that the general understanding of the [*865 profession for very many years has been that an attorney may set off his demand for costs, notwithstanding he has not a month previously delivered a signed bill, the statute not in terms precluding him from so doing, but being confined to a prohibition against his bringing an action for his costs until he has complied with that condition, and every principle of justice and good sense being in favour of that course. I think it would be monstrous if a man who is largely indebted to his attorney, and who has a counter-claim against him, should be allowed to recover in respect of his demand merely because the attorney has not one month before setting it up as a defence delivered his bill. As to any supposed hardship of allowing the set-off, I must confess I do not see any; for it is clear that the Court has the power, and would exercise it, to prevent any injustice being done, by staying the proceedings until an opportunity has been afforded to the client to tax the bill. It has been laid down in several successive editions of Tidd's Practice,—a work which was for many years before the eyes of the profession as one of the very highest authority,—that the set-off is allowable: and the principle is to a certain extent sustained by the case of *Harrison v. Turner*, 10 Q. B. 482 (E. C. L. R. vol. 59). There, to assumpsit on an attorney's bill, the defendant pleaded a set-off, and, in support of that plea, he put in an account furnished to him by the plaintiff: the plaintiff's credit side of this account contained his claim for costs, but of these no signed bill having been delivered, the defendant contended that so much of the plaintiff's account as related to such bill must be struck out: but the Court held that the whole account was evidence for the jury; and Lord Denman, in delivering the judgment of the Court, says: "The *defend- [*866 ant contended that so much of this account as related to the bill of costs was to be excluded from the consideration of the jury, because no signed bill had been delivered to him. We think this objection is not well founded, for, the neglect to deliver such a bill merely prevents an attorney from recovering the amount by action, but does not bar the debt." The amount due to the defendant for his costs is a debt within the statute of set-off, 2 G. 2, c. 22; and I see

charges, and disbursements as is mentioned in the said statute has been delivered or sent to or left for the plaintiff before action:

"3. That the third count of the declaration is bad in substance, upon the ground that the agreement on the part of the defendant therein mentioned is a promise made by a stranger to the said suit in the third count mentioned, and therefore void as an act of maintenance."

though barred by the Statute of Limitations.] Then, the plea of set-off is improperly pleaded to the third count. The plaintiff there claims unliquidated damages. The payment to Harrison was a payment by compulsion of law: and the plaintiff was bound to declare specially: *Spencer v. Parry*, 3 Ad. & E. 331 (E. C. L. R. vol. 30), 4 N. & M. 770 (E. C. L. R. vol. 30). In *Attwooll v. Attwooll*, 2 Ellis & B. 23 (E. C. L. R. vol. 75), it was held that a set-off could not be pleaded to a count on a bond conditioned for indemnity. "It is very much to be regretted," says Lord Campbell, "that the defendant should be without defence, and should be driven to bring a cross-action. But so the law at present is. The condition of the bond, when examined, shows that it is to indemnify generally, and not for the payment of any liquidated demand: and, according to the cases cited, there can be no set-off pleaded in an action on such a bond." [BYLES, J.—Is that part of the third count to which the set-off is pleaded anything more than a demand for money paid?] The damages would not necessarily be the sum which the plaintiff had paid to *Harrison. In *Castelli v. Boddington*, 1 Ellis & B. 66 (E. C. L. R. vol. 72), in assumptionit to recover a partial loss on a valued policy of insurance on goods on a voyage to a market, a set-off for premiums was held to be a bad plea, the action being for unliquidated damages. In *Johnson v. Diamond*, 24 Law J., Exch. 217, C. having at the request of Diamond (the defendant) brought an action against the present plaintiff, Johnson, received from Diamond a bond whereby the latter stipulated that he would pay the present plaintiff such costs as C. should be liable to pay the present plaintiff in case C. should discontinue, become nonsuit, &c., and that he would also permit C. during the pendency of the action or any liability arising therefrom, to retain and apply any money of him (Diamond) that might come into the hands of C. towards the discharge of any costs and liabilities which C. might incur by reason of his permitting the action to be brought and carried on in his name, or from any injury to him from the default of Diamond. C. was nonsuited, and the plaintiff had judgment to recover against C. the costs of such nonsuit. It was held, that the bond did not constitute a "debt" from Diamond to C. within the 61st and 64th sections of the Common Law Procedure Act, 1854, and that the alleged debt in the hands of Diamond could not be attached by the present plaintiff. Martin, B., grounds his decision upon the statute of set-off.

*864] *Hayes*, Serjt., for the defendant.(a)—In Tidd's *Practice, 9th edit. 333, it is distinctly laid down that "the statute 2 G. 2, c.

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That there is no statute in force which, in order to enable the defendant to set off the amount of a bill of costs for fees, charges, or disbursements due to him as an attorney or solicitor, renders it necessary for him to have sent or delivered to or to have left for the plaintiff, one calendar month before action, any bill of such fees, charges, and disbursements:

"2. That the only effect and operation of the statute, 6 & 7 Vict. c. 73, is, to prohibit an attorney or solicitor from commencing or maintaining any action or suit for the recovery of any fees, charges, or disbursements due in respect of any business done by such attorney or solicitor until the expiration of one calendar month after he shall have delivered or sent to or left for the person to be charged therewith a bill of such fees, charges, and disbursements, in manner and form in the said statute mentioned; and that such statute cannot be construed so as to deprive an attorney or solicitor from setting off the amount of any such bill of costs in any action brought against him for a liquidated demand, although no such bill of the said fees,

23, s. 23, only requires the delivery of a bill for *the bringing of an action*; and therefore, though an attorney cannot bring an action on his bill till it has been delivered a month, that circumstance is not necessary to enable him to *set it off*. But he must not produce it at the trial by surprise: it is sufficient in such case to deliver the bill time enough for the plaintiff to have it taxed before the trial." For this, the author refers to *Hooper v. Till*, *Martin v. Winder*, and *Bulman v. Birkett*. [He was stopped by the Court.]

WILLIAMS, J.—I am of opinion that this is a perfectly good set-off, and that the defendant is entitled to judgment on these demurrers. Notwithstanding the case of *Murphy v. Cunningham*, 1 Anst. 198, which certainly *appears to be a case in point in support of the replication, I may say that the general understanding of the [*865 profession for very many years has been that an attorney may set off his demand for costs, notwithstanding he has not a month previously delivered a signed bill, the statute not in terms precluding him from so doing, but being confined to a prohibition against his bringing an action for his costs until he has complied with that condition, and every principle of justice and good sense being in favour of that course. I think it would be monstrous if a man who is largely indebted to his attorney, and who has a counter-claim against him, should be allowed to recover in respect of his demand merely because the attorney has not one month before setting it up as a defence delivered his bill. As to any supposed hardship of allowing the set-off, I must confess I do not see any; for it is clear that the Court has the power, and would exercise it, to prevent any injustice being done, by staying the proceedings until an opportunity has been afforded to the client to tax the bill. It has been laid down in several successive editions of *Tidd's Practice*,—a work which was for many years before the eyes of the profession as one of the very highest authority,—that the set-off is allowable: and the principle is to a certain extent sustained by the case of *Harrison v. Turner*, 10 Q. B. 482 (E. C. L. R. vol. 59). There, to assumpsit on an attorney's bill, the defendant pleaded a set-off, and, in support of that plea, he put in an account furnished to him by the plaintiff: the plaintiff's credit side of this account contained his claim for costs, but of these no signed bill having been delivered, the defendant contended that so much of the plaintiff's account as related to such bill must be struck out: but the Court held that the whole account was evidence for the jury; and Lord Denman, in delivering the judgment of the Court, says: "The *defendant [*866 contended that so much of this account as related to the bill of costs was to be excluded from the consideration of the jury, because no signed bill had been delivered to him. We think this objection is not well founded, for, the neglect to deliver such a bill merely prevents an attorney from recovering the amount by action, but does not bar the debt." The amount due to the defendant for his costs is a debt within the statute of set-off, 2 G. 2, c. 22; and I see

charges, and disbursements as is mentioned in the said statute has been delivered or sent to or left for the plaintiff before action:

"3. That the third count of the declaration is bad in substance, upon the ground that the agreement on the part of the defendant therein mentioned is a promise made by a stranger to the said suit in the third count mentioned, and therefore void as an act of maintenance."

that, where it had been in the habit of charging less than 4s. 6d. per 1000 cubic feet, it might now increase the charge to 5s. 6d. per 1000 cubic feet for common gas. I am very much disposed to think that the explanation which was given by Sir *Fitzroy Kelly* is the true one, viz., that it was supposed that Companies who charged that lower rate were in the habit of supplying the consumer with a very inferior article, and that, that being so, the higher charge was necessary to compensate them for the expense they would necessarily incur when the new Act compelled them to supply gas of such a much higher illuminating power. But, in point of fact, it is of no importance to decide that question, and for this reason, that, whether this is a proviso or a substantive enactment, the absurdity would be exactly the same. But, further, it may well be a proviso, and yet be just as conclusive, as it seems to me, as against the parties to this record. It is a proviso upon the advance of the price of gas. For these reasons, I am of opinion that the plaintiff is entitled to the judgment of the Court.

KEATING, J.—I am of the same opinion, although I must confess that my mind has fluctuated a good deal in the course of the argument. I was much struck by many of the arguments urged by the *Recorder*: but, in the result, I entirely coincide with the opinions expressed by my two learned Brothers. It is not necessary that I should repeat what has been said by my Brother Willes as to the *841] object and intent of this Act of Parliament. I agree with him, that, in construing this Act and its several provisions, we cannot exclude from our consideration that part of the preamble which refers to the absence of uniformity in respect of the regulations to which these Companies are subject: and although, undoubtedly, the construction of the Act is not unattended with difficulty,—a difficulty which is greatly enhanced by the change which Acts of Parliament sometimes undergo during their progress through their various stages,—yet I think that the construction at which the Court has arrived in this case will reconcile most if not all of the difficulties which have been suggested. The legislature clearly intended to affect the price of supply mentioned in former gas Companies Acts. I agree, that, where we find in an Act of Parliament a prohibition against a public Company exacting more than a prescribed rate, we should require a very clear enactment in a subsequent Act to remove that restriction. But it is equally clear, that, if we find in a later Act of Parliament provisions which are utterly inconsistent with those of an earlier Act, we are bound to give effect to the later provisions. Now, in addition to the sections to which my learned Brothers have referred for the purpose of showing that the legislature when they passed this Act must have conceived that there was a rate prescribed for the price of gas, in addition to the 14th section, which speaks of a "rate prescribed by this Act," and to the 36th section, which was read by my Brother Byles, I would call attention to the 35th section, which refers in terms not less clear to a rate prescribed by the Act, for, it provides, that, "after the 31st of December, 1860. no gas Company shall, except under existing contracts, demand or take for any gas or five-light meter supplied by them any sum of

(a) By section 14.

money not exceeding the rate or meter-rent by this *Act authorized." (a) Undoubtedly it might at first suggest itself that [*842 that section applies altogether to meters and meter-rent: but it will be observed, that, not only does it apply to "any gas or five-light meter" supplied by the Company, but it goes on to say "any sum of money exceeding the rate or meter-rent by this Act authorized." Without doing any violence to the construction, it seems to me that "rate" there may be taken to apply to the price charged for the gas supplied. But, even without that section, it seems to me that the two sections which have been referred to are quite sufficient to show that the legislature conceived that a rate had been prescribed by the Act. That brings us to the 40th section, which is the only one that does prescribe a rate for the supply of gas. I entirely agree with my Brother Willes in the observations which he has made upon that section. And, upon the whole, I concur in giving judgment for the plaintiffs.

Judgment for the plaintiffs.

(a) By section 14.

SMURTHWAITE v. WILKINS and Another. Feb. 11.

Under the Bills of Lading Act, 18 & 19 Vict. c. 111, the rights and liabilities of the consignee or endorsee of the bill of lading pass from him by endorsement over to a third person.

THE declaration was for money payable by the defendants to the plaintiff for freight for the conveyance by the plaintiff for the defendants, at their request, of goods in ships, and for money found to be due from the defendants to the plaintiff on accounts stated between them.

Third plea, as to the claim for freight, that the said freight is claimed for conveyance of goods on a voyage from Odessa to a port in Great Britain or Ireland, and *which was payable to the [*843 plaintiff by virtue of a charter-party and a bill of lading made with reference to the conveyance of the said goods, and under which the same were shipped and carried on the said voyage, and by the said bill of lading it was declared that the said goods were shipped by Ephrussi & Co., of Odessa, on the ship Catherine Green, then in the port of Odessa, and bound for Cork or Falmouth for orders, and the said goods were thereby made deliverable at a safe port in the united kingdom of Great Britain or Ireland, except as therein excepted, unto J. H. Schroeder & Co., London, or their assigns, paying freight for the said goods as per charter-party, less 142*l.* 4*s.*, received as advanced on account of the freight and of the premium of insurance thereon; and the said Ephrussi & Co. and J. H. Schroeder & Co. were not either of them the defendants or the agents of the defendants; and the defendants did not by themselves or their agents ship the said goods or any part thereof, nor were consignors or consignees of any of the said goods, nor were parties to or named in the said charter-party or bill of lading; and the defendants first became interested in the said goods by purchasing the same after the said shipment thereof, and after the making and delivery of the said bill of lading, and during the said voyage, the said purchase being made from the said J. H.

Schroeder & Co., who on such purchase endorsed the said bill of lading to the defendants: and afterwards, during the said voyage, and before any of the said goods arrived at the port of delivery or were delivered or deliverable, and before any of the freight now claimed was payable, the defendants, for a sufficient and valuable consideration then paid to them by the purchasers hereinafter mentioned, sold and disposed of the said goods and all interest of the defendants therein. *844] and all right to the possession thereof, to *certain other persons, to wit, King, Melvil & Co., and then endorsed and delivered the said bill of lading to the said King, Melvil & Co., in order to vest, and vested, in them all property, right, and interest in and to the said goods, and the defendants then ceased to have, and they had not at any time thereafter, any property or interest in the said goods or the delivery thereof; and the delivery, so far as the same took place, was to persons other than the defendants, and the defendants never promised the plaintiff to pay him all or any of the said freight, and never were liable except or otherwise than as aforesaid.

To this plea the plaintiff demurred, the ground of demurrer stated in the margin being, "that the defendants, having once become liable to the plaintiff for the freight, by reason of the endorsement to them of the said bill of lading, and the vesting in them of the property in the said goods, as conceded by the plea, are still liable to the plaintiff for the said freight, notwithstanding the said endorsement of the bill of lading by the defendants to other persons, and the alleged transfer of the property in the said goods to other persons by such endorsement." Joinder.

Lewers (with whom was *Manisty*, Q. C.), in support of the demurrer. (a) *845] —Enough is admitted upon this *record to show that the defendants are liable for the freight in question. They became purchasers of the goods and assignees of the bill of lading from Schroeder & Co. The language of the 1st section of the Bills of Lading Act, 18 & 19 Vict. c. 111, are very general,—“Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or

(a) The points marked for argument on the part of the plaintiff were as follows :—

“1. That the 1st section of the 18 & 19 Vict. c. 111 (the Bills of Lading Act) renders the defendants, as endorsees of the bill of lading mentioned in the third plea, and proprietors at one time of the goods therein described, subject to the same liabilities in respect of freight as if the contract contained in the said bill of lading had been made with themselves; and that, as the party or parties with whom that contract was made would not be discharged from their liabilities in respect of freight by the circumstances alleged in the said plea, so neither are the defendants, standing as they do by virtue of the said Act in the same position as the party or parties, discharged from their said liabilities by the said circumstances :

“2. That the alleged transfer of the property in the said goods to the defendants' assigns by endorsement of the said bill of lading, does not prejudice or affect any liability to which the defendants may have been subject to pay freight in respect of the same, notwithstanding that it may have created a new liability under the said Act to pay freight on the part of the defendants' assigns, the liability of mesne endorsees being expressly saved and reserved by the second section of the said Act :

“3. That, irrespectively of the said Act, the circumstances alleged in the said plea, so far from operating as a discharge of the defendants from their liability to pay the said freight, are not inconsistent with the continuing liability of the defendants to pay the same, inasmuch as they disclose a constructive taking of the said goods by the defendants under the said endorsement, and such constructive taking is evidence from which a jury might lawfully and reasonably infer a contract between the defendants and the plaintiff to pay freight in respect of the said goods.”

by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself." That puts the consignee or endorsee in whom the property in the goods has vested in the same position in respect of liabilities and of rights as the consignor stood in; and no *subsequent endorsement can discharge that liability. At common law, the acceptance of goods under a bill of lading was evidence whence a jury might infer a contract to pay the freight: *Sanders v. Vanzeller*, 2 Gale & D. 244; *Wegener v. Smith*, 15 C. B. 285 (E. C. L. R. vol. 80): therefore, if the argument on the other side be correct, the provision in the Bills of Lading Act was unnecessary. [ERLE, C. J.—A bill of lading may pass through the hands of several persons before the goods arrive. Do you contend that each endorsee remains liable to the shipowner for the freight?] Yes. [ERLE, C. J.—The statute to some extent remedies what was felt to be a crying evil: but this construction would make it work a most glaring injustice.] The 2d section removes all doubt: it enacts that "nothing herein contained shall prejudice or affect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement." The language of the 1st section is general and free from all ambiguity. The moment it is shown that a person is endorsee of a bill of lading, his liability attaches, and nothing which takes place afterwards can discharge him from that liability. Besides, apart from the statute, there is enough here to warrant a jury in inferring a contract to pay the freight. The defendants are endorsees of the bill of lading and so acquire the property in the goods. They sell the goods, and receive the price. The receipt of the goods by their assignees is consequently a constructive receipt by the defendants themselves. The main reliance, however, is, upon the plain and unambiguous words of the statute.

**Aspland*, contra, was stopped by the Court.(a)

ERLE, C. J.—The argument of Mr. *Lewers* has not satisfied me that the plaintiff in this case is entitled to judgment. The action is brought to recover freight, and the facts which are admitted upon the record are, that goods were shipped at Odessa under an ordinary bill of lading, that the bill of lading was assigned to the defendants, and by them assigned over to third parties, by whom the goods were received. The contention on the part of the plaintiff is, that the property in the goods passing to the defendants by the assignment of the bill of lading, under the Bills of Lading Act, 18 & 19 Vict. c. 111, they are liable for the freight, although they never received the goods.

(a) The points marked for argument on the part of the defendants were as follows:—

"1. That the defendants are shown by the third plea never to have become liable to pay freight, having endorsed over the bill of lading for valuable consideration during the voyage:

"2. That, if ever liable in any sense, they ceased to be so on the endorsement of the bill of lading:—

"3. That it was not intended by the Bills of Lading Act, 18 & 19 Vict. c. 111, that successive endorsees of bill of lading should be liable at the same time for freight; and that, assuming the defendants to be under any liability, it is not of a nature to support the declaration."

Now, the words of the 1st section of that Act are, that "every consignee of goods named in a bill of lading, and every *endorsee* of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself." The consignor remains always liable for the freight; and, because the statute

*848] *says that every consignee or assignee shall by reason of the consignment or endorsement have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of the goods as if the contract contained in the bill of lading had been made with him, the contention is that the consignee or assignee shall always remain liable, like the consignor, although he has parted with all interest and property in the goods by assigning the bill of lading to a third party before the arrival of the goods. The consequences which this would lead to are so monstrous, so manifestly unjust, that I should pause before I consented to adopt this construction of the Act of Parliament. The person who received the goods under the bill of lading was always considered liable for the freight; but that was not by virtue of an original liability as a contracting party, but on a contract implied from his acceptance of the goods. Looking at the whole statute, it seems to me that the obvious meaning is, that the assignee *who receives the cargo* shall have all the rights and bear all the liabilities of a contracting party; but that, if he passes on the bill of lading by endorsement to another, he passes on all the rights and liabilities which the bill of lading carries with it. The preamble of the statute leads me to that conclusion: it states that, "whereas, by the custom of merchants, a bill of lading of goods being transferrable by endorsement, the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property." Therefore, the statute in effect in s. 1 enacts, that, if the consignor assigns the bill of lading, all his rights in respect of the goods shall pass with the property. When the assignee assigns over to another.

*849] *does he retain all the rights and liabilities of the original contracting party? He clearly has no right to the cargo. Is he, then, by the endorsement, to pass on his rights to the endorsee, and to retain all his liabilities in respect of the goods? Such a construction might be very convenient for the shipowner, but it would be clearly repugnant to one's notions of justice. The preamble indicates the expediency of the consignor's rights in respect of the contract contained in the bill of lading passing by the endorsement of it; and the 1st section, in order to carry out that intention, provides for the passing by the endorsement of the rights and liabilities which ought to attach to the right of property in the goods. Whilst, therefore, he remains the holder of the bill of lading, the assignee is clothed with all the rights and liabilities which attach to the contract: but, when he parts with it by endorsement to a third person, he passes on to such third party all the rights which he himself had, and all the liabilities also. It was further contended by Mr. *Lewers* that the

defendants were liable at common law, and that, inasmuch as the assignees on assigning over received the price of the goods, the receipt of the goods by their assignees was a constructive receipt of the goods by themselves. The origin of the common law liability of the assignee of the bill of lading was this,—the master had a lien upon the cargo, and the receipt of the goods by the consignee or assignee was assumed to be made under an implied bargain, that, if the master would forego his lien, he, the assignee, would pay freight and demurrage. That, however, cannot in the smallest degree apply to one who does not receive the goods.

WILLIAMS, J.—I am of the same opinion. The words of the 1st section, taken literally, are *undoubtedly very general. But, [*850 looking at the preamble, and at the general scope and intention of the statute, I can entertain no doubt that the view presented by my Lord is the true one. The general scope of the Act is, that, whereas before, by the custom of merchants, the property in the goods passed by the endorsement and delivery of the bill of lading, now all the rights and liabilities of the consignor under the contract shall pass with the property,—that is, that, where the right of property leaves the party, the rights and liabilities under the contract shall leave him also. The owner can sue no one but him to whom the property has passed.

The rest of the Court concurring,

Judgment for the defendant.

MEARS v. THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY. Feb. 28.

The owner of a chattel, *e. g.*, a barge, which is out on hire for an unexpired term, may maintain an action against a third person for a permanent injury thereto.

THE declaration stated that the plaintiff, before and at the time of the committing of the grievance thereafter mentioned, was the owner of a certain barge, which said barge was before then let to hire to one John Scott Russell for a certain time then unexpired, and the same was then in the possession of the said John Scott Russell by virtue of the said letting, the reversion therein then belonging to the plaintiff; that the defendants were by their servants in that behalf engaged in raising a boiler from and out of the said barge; yet that the defendants were guilty of such negligence, carelessness, and improper conduct in and *about the raising and attempting to raise the said boiler [*851 out of the said barge, and used such improper and insufficient materials for that purpose, that, by reason thereof, the said boiler fell into the said barge, and greatly damaged and injured the same; whereby the plaintiff had been deprived of the use of his said barge for a long space of time, and had lost divers gains and profits which he would have acquired therefrom, and was greatly injured in his reversionary interest therein, and would be put to great expense in and about repairing the damage so done to the said barge.

To this declaration the defendants demurred, on the ground that

"the facts stated in the declaration show no cause of action against the defendants." Joinder.

Milward, in support of the demurrer.(a)—No precedent is to be found of an action by the reversioner for an injury to a chattel whilst out of his possession. The barge being at the time of the accident in the possession of Scott Russell, who was apparently the owner, and who was entitled to the possession for an unexpired term, the consequence of holding that the plaintiff may sue will be that the defendants may have two actions brought against them for the same *852] *damages, to neither of which would a judgment in the other be an answer. There was no privity between the plaintiff and the defendants in respect of which the latter could be guilty of negligence to the former. It may be that the servants of Scott Russell represented the weight of the article to be lifted to be 10 tons,—a weight for which the defendants' crane was sufficient,—when in fact the weight was 15 tons; and so the accident arose from no default on the defendants' part. If the action were brought by Scott Russell, the person with whom the defendants contracted, this would be a good answer. The case falls within the principle of *Blakemore v. The Bristol and Exeter Railway Company*, 8 Ellis & B. 1035 (E. C. L. R. vol. 92). [ERLE, C. J.—I must confess I do not see how that case bears upon the present.] The plaintiff may have a remedy against Scott Russell. [WILLIAMS, J.—The authorities upon this subject are considered in *Tancred v. Allgood*, 4 Hurlst. & N. 438.† The first count of the declaration there stated that the plaintiff was the owner of goods which had been let to hire to one T. for a term, and that the defendant sold the goods and dispersed them so as to prevent the same being followed and found, whereby the plaintiff was injured in her reversionary estate. The second count was similar to the first, except that it alleged that the goods were let to T. "to be used in a certain house and not otherwise or elsewhere, that T. had the use of the goods subject to the expiration of the term, and subject to the determination of the term by the violation of the terms thereof." The defendant pleaded that he seized and took and sold the goods, not in market overt, but as sheriff under a writ of fi. fa. against T., and that the plaintiff had not sustained and would not sustain any damage by reason of the premises; and it was held, that, as the damages sustained *853] by the plaintiff were the *foundation of the action, the pleas were an answer to the action. In giving judgment, Pollock, C. B., says: "Probably any temporary damage done while the plaintiff's possession was suspended by her contract with another person is not the foundation of an action." Nobody suggested a doubt that the action would have lain for a *permanent* injury to the plaintiff's reversionary interest in the goods.] In that case there was a sale out

(a) The points marked for argument on the part of the defendants were as follows:—

"That, if the declaration be in contract, it is bad on the ground of there being no privity between the plaintiff and the defendants, and that it appears from the declaration that Mr. Scott Russell, if any one, is the proper person to sue:

"And that, if the declaration be in tort, it is bad for not showing a permanent injury to the reversion, and that it is consistent with the declaration that the damage done might have been and ought to have been repaired by Scott Russell before redelivery to the plaintiff; and also that a person not in possession of a chattel cannot sue, the remedy being in the hands of the person in possession."

and out. [ERLE, C. J.—The purchaser buys at his peril.] At the utmost, here the declaration discloses only a temporary damage. The subject was again discussed in the Court of Exchequer, in *The Lancashire Wagon Company v. Fitzhugh*, 6 Hurlst. & N. 502.† The declaration does not necessarily show any permanent damage: non constat that Scott Russell would not have repaired the barge. At all events, there was no contract between the defendants and the plaintiff, nor any duty by law cast upon the former to repair.

Petersdorff, Serjt., contra, was not called upon.(a)

ERLE, C. J.—This is an action brought by the owner of a barge to recover damages for injury done to it by the negligence of the defendants' servants whilst it was out on hire to a third person. The question is, whether the owner of the barge has a right to maintain an action for that injury. In my opinion he has that right, the mere temporary outstanding interest in the hirer of the barge amounting to nothing. That **trover* will not lie for the conversion of a chattel out on loan, is clear: *Gordon v. Harper*, 7 T. R. 9. [*854] But, in *Tancred v. Allgood*, 4 Hurlst. & N. 438,† it was by implication held that an action for a permanent injury done to a chattel while the owner's right to the possession is suspended, may be maintained. I do not see the bearing of that melancholy case of *Blakemore v. The Bristol and Exeter Railway Company* upon this. It may, however, be observed, that Scott Russell, the hirer of the barge, having taken it to the defendants' premises for the purpose of being loaded by their servants, the defendants cannot be said to be quite strangers to the plaintiff: whereas, in *Blakemore v. The Bristol and Exeter Railway Company*, the injured person was a helper of a helper, and one stage removed from the parties contracted with.

WILLIAMS, J.—I am of the same opinion. It is alleged in the declaration and admitted by the demurrer, that the wrongful act of the defendants' servants has caused a permanent injury to the chattel of the plaintiff. It is true that the barge at the time was let out to Scott Russell for an unexpired term. But subject to Scott Russell's temporary interest in it, the barge still remained the property of the plaintiff: and I see no reason why the plaintiff should not maintain the action. It is fully established, that, in the case of a bailment not for reward, either the bailor or the bailee may bring an action for an injury to the thing bailed; but, in the case of a hiring, the owner cannot bring *trover*, because he has temporarily parted with the possession. It seems to me, however, to be clear, that, though the owner cannot bring an action where there has been no permanent injury to the chattel, it has never been doubted, that, where there is a **permanent injury*, the owner may maintain an action against the person whose [*855] wrongful act has caused that injury.

The rest of the Court concurring,

Judgment for the plaintiff.

(a) The point marked for argument on the part of the plaintiff was as follows:—

"That the declaration shows a good cause of action against the Company in consequence of the plaintiff's reversionary interest in the barge being injured through the negligence and improper conduct of the defendants' servants."

BROWN v. TIBBITS. *Feb. 11.*

An attorney may set off a claim for costs, notwithstanding no signed bill has been delivered.

To a count on an agreement to indemnify the plaintiff against all costs which the plaintiff might be obliged to pay as defendant in a certain suit, or in consequence thereof, alleging that the plaintiff, as such defendant in that suit, was compelled to pay in the said suit and in consequence thereof a certain sum as and for costs,—the defendant pleaded, “as to so much of the count as relates to the plaintiff’s claim in respect of the payment by him of the said sum of money as and for costs in the said suit,” a set-off:—Held, a good plea.

THE first count of the declaration stated that the defendant, by a certain indenture between the defendant of the one part and the plaintiff of the other part, covenanted with the plaintiff that he would pay the plaintiff the sum of 50*l.*, together with interest for the same after the rate of 5*l.* per cent. per annum, on the 10th of January, 1859; yet the defendant has not paid the said sum of 50*l.*, or any part thereof.

The second count stated that the defendant, by a certain other indenture between the defendant of the one part and the plaintiff of the other part, covenanted with the plaintiff that he would pay the plaintiff another sum of 50*l.*, with interest for the same after the rate of 10*l.* per cent. per annum, on the 10th of January, 1859; yet the defendant had not paid the last-mentioned sum of 50*l.*, or any part thereof.

The third count stated, that the defendant being an attorney and solicitor, in consideration that the (now) plaintiff at the request of the defendant, would employ the defendant as his attorney and solicitor in and about a certain suit in which one Matthew Harrison was the *856] plaintiff and the (now) plaintiff was the *defendant, the defendant promised the (now) plaintiff to indemnify the (now) plaintiff against all costs which he the (now) plaintiff might as such defendant in the said suit be obliged to pay in the said suit or in consequence thereof, the same being conducted by the defendant as such attorney of the (now) plaintiff as aforesaid: that the (now) plaintiff, relying on the defendant’s said promise, employed him accordingly, and the defendant as such attorney, by virtue of such employment, acted as the (now) plaintiff’s attorney in the said suit, and conducted such suit to its termination; and that the (now) plaintiff as such defendant in the said suit as aforesaid was compelled to pay in the said suit, and in consequence thereof, as and for costs, to wit, to the said Matthew Harrison, as the plaintiff therein, a large sum, to wit, 131*l.* 18*s.* 10*d.*; and, although all things had happened necessary to entitle the (now) plaintiff to have the defendant’s said promise fulfilled, yet the defendant had broken the same, and had not indemnified the (now) plaintiff according to his said promise, or paid the (now) plaintiff the said sum of 131*l.* 18*s.* 10*d.*, or any part thereof: Claim, 300*l.*

The defendant pleaded,—first, to the first and second counts of the declaration, and also to so much of the third count as related to the plaintiff’s claim in respect of the payment by him of the said sum of money as and for costs in the said suit, that the plaintiff, before and at the time of the commencement of this suit, was, and thence hitherto had been and still now is, indebted to the defendant in an amount equal to so much of the said claim of the plaintiff as that plea was

pleaded to, for money payable by the plaintiff to the defendant for work done and materials for the same provided by the defendant for the plaintiff at his request, and for money paid by the defendant for the plaintiff at his request, and for money found to be due from the *plaintiff to the defendant on accounts stated between them, [*857 which said amounts the defendant was ready and willing and thereby offered to set off against so much of the said claim of the plaintiff as that plea was pleaded to.

Second replication to the first plea,—except so much thereof as relates to money found to be due from the plaintiff to the defendant on accounts stated between them,—that the work done and the money paid as in that count mentioned was and is work done and fees, charges, and disbursements in respect of and about such work, charged and paid by the defendant as the attorney and solicitor of the plaintiff, and that the defendant did not one calendar month before this suit send or deliver to or leave for the plaintiff (he being the person to be charged therewith) a bill of such fees, charges, and disbursements, according to the statute in that case made and provided.

Rejoinder, that the said work, charges, and disbursements in the second replication mentioned was done and were charged by and accrued due to the defendant respectively as such attorney and solicitor as in and by the said second replication mentioned, after the passing of the Act of Parliament passed in the 7th. year of the reign of Her present Majesty Queen Victoria (6 & 7 Vict. c. 73), intituled “An Act for consolidating and amending several of the laws relating to attorneys and solicitors practising in England and Wales.”

The defendant also demurred to the second replication, the ground of demurrer stated in the margin being, “that the fact of the defendant having, as in the said second replication mentioned, failed to send or deliver to or leave for the plaintiff, one calendar month before this suit, a bill of the defendant's fees, charges, and disbursements, does not in any way prejudice his right to set off the amount thereof.” Joinder.

*The plaintiff demurred to the rejoinder, the ground of demurrer stated in the margin being, “that the provisions of the [*858 Act of Parliament therein mentioned show the replication to be good and the rejoinder bad in substance.” Joinder.(a)

Crompton Hutton, for the plaintiff.(b)—The main question is whether an attorney's bill which has not been duly signed and delivered pursuant to the statute now in force, the 6 & 7 Vict. c. 73, s. 37, can form the subject of a set-off. The 3 Jac. 1, c. 7, s. 1, enacted that “all

(a) Some discussion having arisen as to whether the plaintiff or the defendant had the right to begin,—seeing that the defendant's demurrer stood first upon the record,—Willes, J., referred to *Williams v. Jarman*, 13 M. & W. 128,† 2 D. & L. 212, and observed that the practice was now uniform, that, where there are cross-demurrers, the plaintiff begins.

And see *Baker v. The Midland Railway Company*, 18 C. B. 46 (E. C. L. R. vol. 86), and the authorities referred to in the note to that case, p. 53.

(b) The points marked for argument on the part of the plaintiff were as follows:—

“That, a set-off being a cross-action, the replication to the plea of set-off showing that no signed bill was delivered one month before action gives a good answer to the plea of set-off, by virtue of the 6 & 7 Vict. c. 73, s. 37, and that the rejoinder is bad for the same reason: that the plea of set-off is bad, in being pleaded to a part of the claim in the third count of the declaration, such claim being for unliquidated damages, and not for a debt or sum certain: and that the third count is good and unobjectionable.”

attorneys and solicitors should give a true bill unto their masters or clients, or their assigns, of all charges concerning the suits which they have for them, subscribed with his own hand and name, before such time as they or any of them should charge their clients with any the same fees or charges." Then came the 2 G. 2, c. 23, s. 23, which enacted that *859] acted that "no attorney or solicitor of any of the Courts aforesaid (the superior Courts at Westminster, the Courts of great sessions in Wales, and the palatinate Courts, &c.), shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements at law or in equity, until after the expiration of one month or more after such attorney or solicitor respectively shall have delivered unto the party or parties to be charged therewith, or left for him, her, or them, at his, her, or their dwelling-house or last place of abode, a bill of such fees, charges, and disbursements, &c., which bill shall be subscribed with the proper hand of such attorney or solicitor respectively." The 37th section of the 6 & 7 Vict. c. 73, is in nearly the same terms: "No attorney or solicitor, nor any executor, administrator, or assignee of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor, or executor, &c., shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last-known place of abode, a bill of such fees, charges, and disbursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor (or, in the case of a partnership, by any of the partners, either with his own name or with the name or style of such partnership), or of the executor, administrator, or assignee of such attorney or solicitor, or be enclosed in or accompanied by a letter subscribed in like manner, referring to such bill." [BYLES, J.—The words are "shall commence or maintain any action," &c.] The statute of set-off, 2 G. 2, c. 22, s. 13, enacts, that, "where there are mutual debts between the plaintiff *860] and defendant, or, if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator, or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on," &c. The party, therefore, who relies upon a set-off, must show that he had an actionable debt at the time of the commencement of the suit: *Rogerson v. Ladbrooke*, 1 Bingh. 93 (E. C. L. R. vol. 8), 7 J. B. Moore 412 (E. C. L. R. vol. 17). In *Murphy v. Cunningham*, 1 Anstr. 198, it was distinctly held that an attorney cannot set off his bill without having delivered it. [WILLES, J., referred to the note to *Hooper v. Till*, 1 Dougl. 199, where it is said: "It seems to have been taken for granted that an attorney cannot set off his bill till a month after it has been delivered: but the contrary was held by the Court in E. 23 G. 3, in a case of *Martin v. Winder*; for, in that case, Law having moved on the part of the defendant, who

was an attorney, for a rule to show cause why the proceedings should not be stayed till his bill should be paid, or till a month from the delivery of it should expire, *that he might be enabled to set it off*, the Court held, that, though an attorney cannot bring an action on his bill till it has been delivered a month, that circumstance is not necessary to enable him to set it off; that he must not produce it at the trial by surprise, but that it is sufficient in such case to deliver it time enough for the plaintiff to have it taxed before the trial. Upon hearing this opinion of the Court, Law withdrew his motion as unnecessary." In *Bulman v. Birkett*, 1 Esp. N. P. C. 449, it was ruled by Lord Kenyon, that, in an action against an attorney, to *which he gives notice of set-off of his bill for business done [861 for the plaintiff, he must deliver a bill signed, but it need not be delivered a month under the statute. [WILLES, J.—In *Ex parte Howell*, 1 Rose 312, it was held that an attorney might sue out a commission upon a debt for costs, without having delivered a signed bill: and in *Eicke v. Nokes*, M. & M. 303 (E. C. L. R. vol. 22), Lord Tenterden ruled that an attorney might prove his bill under a commission of bankrupt, without having delivered a signed bill.] Reliance will, no doubt, be placed upon the case of *Lester v. Lazarus*, 2 C. M. & R. 669,† 4 Dowl. P. C. 397, where Parke, B. says: "Perhaps the more extensive language of the statute of James might operate to preclude an attorney, not only from suing for, but also from *setting off* the amount of the bill unless delivered. It has been held that the 2 G. 2 applies only to the case of attorneys suing as plaintiffs." But that is entirely extrajudicial: and the case of *Murphy v. Cunningham* had not been brought to the notice of the Court. A plea of set-off showing that the plaintiff was indebted to the defendant *at the time of plea pleaded*, is bad; it must show that he was indebted *at the commencement of the action*: *Evans v. Prosser*, 3 T. R. 186. In *Francis v. Dodsworth*, 4 C. B. 202, 220 (E. C. L. R. vol. 56), Lord Truro, in delivering the judgment of the Court, speaking of the 2 G. 2, c. 22, s. 13, says: "The judicial construction of this section has been, that no debts can be used by way of set-off under this statute, except such as are recoverable by *action*; and it has accordingly been held that the Statute of Limitations may be replied to a plea of set-off. In *Chapple v. Durston*, 1 C. & J. 1,† it was held, that, to a plea of set-off, the Statute of Limitations must be specially replied; and it was stated in the judgment that a plea of set-off has ever been considered in the nature of a cross-declaration. And in *Ford v. Dornford*, 15 L. J., *Q. B. 172, Patteson, J., adopts the case of *Chapple v. Durston*."(a) In *Richards v. Easto*, 15 M. & W. 244, 250,† upon its [862 being suggested in argument, that "it is incorrect to say that every special plea must necessarily be in confession and avoidance; the plea of the Statute of Limitations is an instance to the contrary; it goes to the remedy only, not to the right." Parke, B., says: "So also the plea that an attorney has not delivered a signed bill." [BYLES, J.—The Statute of Limitations bars the remedy completely: this statute only suspends it. WILLIAMS, J.—The debt is not the less a debt,

(a) In a subsequent part of the judgment his Lordship says: "It may be correct, for some purposes, to consider the plea of set-off as a declaration: but we do not feel ourselves called upon or warranted in saying that the analogy exists for all purposes."

though barred by the Statute of Limitations.] Then, the plea of set-off is improperly pleaded to the third count. The plaintiff there claims unliquidated damages. The payment to Harrison was a payment by compulsion of law: and the plaintiff was bound to declare specially: *Spencer v. Parry*, 3 Ad. & E. 331 (E. C. L. R. vol. 30), 4 N. & M. 770 (E. C. L. R. vol. 30). In *Attwooll v. Attwooll*, 2 Ellis & B. 23 (E. C. L. R. vol. 75), it was held that a set-off could not be pleaded to a count on a bond conditioned for indemnity. "It is very much to be regretted," says Lord Campbell, "that the defendant should be without defence, and should be driven to bring a cross-action. But so the law at present is. The condition of the bond, when examined, shows that it is to indemnify generally, and not for the payment of any liquidated demand: and, according to the cases cited, there can be no set-off pleaded in an action on such a bond." [BYLES, J.—Is that part of the third count to which the set-off is pleaded anything more than a demand for money paid?] The damages would not necessarily be the sum which the plaintiff had paid to *Harrison. In *Castelli v. Boddington*, 1 Ellis & B. 66 (E. C. L. R. vol. 72), in assumpsit to recover a partial loss on a valued policy of insurance on goods on a voyage to a market, a set-off for premiums was held to be a bad plea, the action being for unliquidated damages. In *Johnson v. Diamond*, 24 Law J., Exch. 217, C. having at the request of Diamond (the defendant) brought an action against the present plaintiff, Johnson, received from Diamond a bond whereby the latter stipulated that he would pay the present plaintiff such costs as C. should be liable to pay the present plaintiff in case C. should discontinue, become nonsuit, &c., and that he would also permit C. during the pendency of the action or any liability arising therefrom, to retain and apply any money of him (Diamond) that might come into the hands of C. towards the discharge of any costs and liabilities which C. might incur by reason of his permitting the action to be brought and carried on in his name, or from any injury to him from the default of Diamond. C. was nonsuited, and the plaintiff had judgment to recover against C. the costs of such nonsuit. It was held, that the bond did not constitute a "debt" from Diamond to C. within the 61st and 64th sections of the Common Law Procedure Act, 1854, and that the alleged debt in the hands of Diamond could not be attached by the present plaintiff. Martin, B., grounds his decision upon the statute of set-off.

*864] *Hayes*, Serjt., for the defendant.(a)—In Tidd's *Practice, 9th edit. 333, it is distinctly laid down that "the statute 2 G. 2, c.

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That there is no statute in force which, in order to enable the defendant to set off the amount of a bill of costs for fees, charges, or disbursements due to him as an attorney or solicitor, renders it necessary for him to have sent or delivered to or to have left for the plaintiff, one calendar month before action, any bill of such fees, charges, and disbursements:

"2. That the only effect and operation of the statute, 6 & 7 Vict. c. 73, is, to prohibit an attorney or solicitor from commencing or maintaining any action or suit for the recovery of any fees, charges, or disbursements due in respect of any business done by such attorney or solicitor until the expiration of one calendar month after he shall have delivered or sent to or left for the person to be charged therewith a bill of such fees, charges, and disbursements, in manner and form in the said statute mentioned; and that such statute cannot be construed so as to deprive an attorney or solicitor from setting off the amount of any such bill of costs in any action brought against him for a liquidated demand, although no such bill of the said fees,

23, s. 23, only requires the delivery of a bill for *the bringing of an action*; and therefore, though an attorney cannot bring an action on his bill till it has been delivered a month, that circumstance is not necessary to enable him to *set it off*. But he must not produce it at the trial by surprise: it is sufficient in such case to deliver the bill time enough for the plaintiff to have it taxed before the trial." For this, the author refers to *Hooper v. Till*, *Martin v. Winder*, and *Bulman v. Birkett*. [He was stopped by the Court.]

WILLIAMS, J.—I am of opinion that this is a perfectly good set-off, and that the defendant is entitled to judgment on these demurrers. Notwithstanding the case of *Murphy v. Cunningham*, 1 Anst. 198, which certainly *appears to be a case in point in support of [*865 the replication, I may say that the general understanding of the [*865 profession for very many years has been that an attorney may set off his demand for costs, notwithstanding he has not a month previously delivered a signed bill, the statute not in terms precluding him from so doing, but being confined to a prohibition against his bringing an action for his costs until he has complied with that condition, and every principle of justice and good sense being in favour of that course. I think it would be monstrous if a man who is largely indebted to his attorney, and who has a counter-claim against him, should be allowed to recover in respect of his demand merely because the attorney has not one month before setting it up as a defence delivered his bill. As to any supposed hardship of allowing the set-off, I must confess I do not see any; for it is clear that the Court has the power, and would exercise it, to prevent any injustice being done, by staying the proceedings until an opportunity has been afforded to the client to tax the bill. It has been laid down in several successive editions of *Tidd's Practice*,—a work which was for many years before the eyes of the profession as one of the very highest authority,—that the set-off is allowable: and the principle is to a certain extent sustained by the case of *Harrison v. Turner*, 10 Q. B. 482 (E. C. L. R. vol. 59). There, to assumpsit on an attorney's bill, the defendant pleaded a set-off, and, in support of that plea, he put in an account furnished to him by the plaintiff: the plaintiff's credit side of this account contained his claim for costs, but of these no signed bill having been delivered, the defendant contended that so much of the plaintiff's account as related to such bill must be struck out: but the Court held that the whole account was evidence for the jury; and Lord Denman, in delivering the judgment of the Court, says: "The *defend- [*866 ant contended that so much of this account as related to the [*866 bill of costs was to be excluded from the consideration of the jury, because no signed bill had been delivered to him. We think this objection is not well founded, for, the neglect to deliver such a bill merely prevents an attorney from recovering the amount by action, but does not bar the debt." The amount due to the defendant for his costs is a debt within the statute of set-off, 2 G. 2, c. 22; and I see

charges, and disbursements as is mentioned in the said statute has been delivered or sent to or left for the plaintiff before action:

"3. That the third count of the declaration is bad in substance, upon the ground that the agreement on the part of the defendant therein mentioned is a promise made by a stranger to the said suit in the third count mentioned, and therefore void as an act of maintenance."

no reason why an attorney should have a judgment recovered against him, when the plaintiff may be indebted to him in an equal or a greater amount, merely because he has rendered no account, considering that the client has ample means of procuring it to be taxed and moderated if necessary. I am therefore of opinion,—and my Brother Willes, who has left the Court to go to Chambers, desired me to say that he fully concurs,—that the defendant is entitled to judgment.

Then it is said that the plea is bad as being pleaded to a part of the claim in the third count which is for unliquidated damages, and not for a debt or sum certain, and therefore a claim to which the statute of set-off does not apply. It must, however, be observed that the plea in question is confined to so much of the third count as relates “to the plaintiff’s claim in respect of the payment by him of the said sum of money as and for costs in the said suit.” It is therefore confined to a payment already made by the plaintiff to a specified amount, as to which the plaintiff claims to be indemnified. The case, therefore, comes within the principle of the judgment in *Hardcastle v. Netherwood*, 5 B. & Ald. 93 (E. C. L. R. vol. 7). That was assumpt, in consideration that the plaintiff, for the accommodation and at the request of the defendant, would accept certain bills of exchange, and would deliver them, so accepted, to the defendant, in order that he *867] might negotiate the same *for his own benefit, the defendant undertook to provide money for the payment of the said bills as they became due, and to indemnify the plaintiff from any loss or damage by reason of the acceptance thereof: breach, that the defendant did not provide money for the bills, nor indemnify the plaintiff from damage, by reason whereof the plaintiff, as acceptor, was forced and obliged to pay to the holders of the bills certain sums of money, with interest, charges, and expenses: and it was held, upon demurrer, that, as the plaintiff might be entitled upon this declaration to recover special damage, a set-off was not a good plea. In giving judgment, the Court says: “This case cannot be distinguished from that which has been cited (*Auber v. Lewis*, E. T. 1818, K. B., *Manning’s N. P. Dig.*, 2d edit. p. 251). The Court must look to the contract declared on, and, if that is such as might entitle the party to recover special damages, the statutes of set-off do not apply, although no special damage be alleged. Here, however, the jury might possibly give damages for the manner in which the plaintiff had been *forced and compelled* to pay the amount of the bills. The defendant might, perhaps, have pleaded a set-off to that part of the count which charges the defendant with the amount of the acceptances paid by the plaintiff.” Adopting that suggestion, I am of opinion that this is a perfectly good plea as pleaded, and therefore that our judgment should be for the defendant.

BYLES, J.—I am of the same opinion, and I have but little to add. As to the absence of a signed bill being an objection to a plea of set-off, it strikes me that the demand of an attorney for fees, charges, and disbursements, answers the description of a debt, though no bill has been delivered. But what influences me is the long current of *868] authorities, as evidenced by all the *editions of *Tidd and Archbold*: (a) and I am not disposed to throw doubt upon a settled

(a) In *Archbold*, 10th edit. 100, the law is thus stated,—“As the statute only requires the delivery of the bill in order to maintain an action or suit for it (*Harrison v. Turner*, 10 Q. B.

practice. The third count states that the terms upon which the defendant was employed to conduct the defence of the suit referred to, were, that the defendant was to indemnify the plaintiff against all costs which he as defendant in that suit might be obliged to pay; it then goes on to allege that the plaintiff, relying on the defendant's promise, employed him as his attorney, and that he was compelled to pay certain costs to the plaintiff in that suit, and that, although all things had happened necessary to entitle the plaintiff to have the defendant's said promise fulfilled, yet the defendant had broken the same, and had not indemnified the plaintiff according to his promise, *or* paid the plaintiff the sum he had paid for such costs, or any part thereof. Now, the breach consists of two parts,—first, that the defendant had not indemnified the plaintiff according to his promise. That would sound in damages, and clearly would not be the subject of a set-off. But the *second part of the breach is, that the defendant has not paid [*869 the plaintiff the sum which he had been obliged to pay for costs. The plea is confined to that part of the breach: and that, it seems to me, is a debt within the statute, to which a set-off may be pleaded. The defendant, therefore, is entitled to our judgment upon both demurrers.

Judgment for the defendant.

482, (E. C. L. R. vol. 59)), an attorney may prove his bill under a fiat of bankruptcy (*Eicke v. Nokes*, M. & W. 303), or be a petitioning creditor (*Ex parte Prideaux*, 1 Glyn & J. 28), without previously delivering it. If the defendant accept a bill of exchange or give a guarantee or any other security for the payment of his bill, the plaintiff may bring an action on the security without delivering such bill (*Jeffreys v. Evans*, 3 D. & L. 52, 14 M. & W. 210†). Also, no delivery is necessary for the purpose of setting off the bill in an action brought against the attorney by his client (*Lester v. Lazarus*, 2 C. M. & R. 667,† per Parke, B.). But the Court or a Judge may in any of the above cases order the delivery of the bill for the purposes of taxation, as in other cases (*Williams v. Frith*, 1 Dougl. 199; *Bulman v. Birkett*, 1 Esp. 449; *Murphy v. Cunningham*, 1 Anstr. 198; Tidd, 9th edit. 333, 334)."

PAUL FELTHOUSE *v.* BINDLEY. *July 8.*

A. and B. verbally treated for the purchase of a horse by the former of the latter. A few days afterwards, B. wrote to A. saying that he had been informed that there was a misunderstanding as to the price, A. having imagined that he had bought the horse for 30*l.*, B. that he had sold it for 30 guineas. A. thereupon wrote to B. proposing to split the difference, adding,—“If I hear no more about him, I consider the horse is mine at 30*l.* 15*s.*” To this no reply was sent. No money was paid, and the horse remained in B.'s possession. Six weeks afterwards, the defendant, an auctioneer who was employed by B. to sell his farming stock, and who had been directed by B. to reserve the horse in question, as it had already been sold, by mistake put it up with the rest and sold it. After the sale B. wrote to A. a letter which substantially amounted to an acknowledgment that the horse had been sold to him:—

Held, that A. could not maintain an action against the auctioneer for the conversion of the horse, he having no property in it at the time the defendant sold it,—B.'s subsequent letter not having (as between A. and a stranger) any relation back to A.'s proposal.

THIS was an action for the conversion of a horse. Pleas, not guilty, and not possessed.

The cause was tried before Keating, J., at the last Summer Assizes at Stafford, when the following facts appeared in evidence:—The plaintiff was a builder residing in London. The defendant was an auctioneer residing at Tamworth. Towards the close of the year 1860, John Felthouse, a nephew of the plaintiff, being about to sell

his farming stock by auction, a conversation took place between the uncle and nephew respecting the purchase by the former of a horse of the latter; and, on the first of January, 1861, John Felthouse wrote to his uncle as follows:—

“Bangley, January 1st, 1861.

*870] “Dear Sir,—I saw my father on Saturday. He told *me that you considered you had bought the horse for 30*l.* If so, you are labouring under a mistake, for, 30 *guineas* was the price I put upon him, and you never heard me say less. When you said you would have him, I considered you were aware of the price, as I would not take less.

“JOHN FELTHOUSE.”

The plaintiff on the following day replied as follows:—

“London, January 2d, 1862.

“Dear Nephew,—Your price, I admit, was 30 *guineas*. I offered 30*l.*,—never offered more: and you said the horse was mine. However, as there may be a mistake about him, I will split the difference, —30*l.* 15*s.*,—I paying all expenses from Tamworth. You can send him at your convenience, between now and the 25th of March. If I hear no more about him, I consider the horse mine at 30*l.* 15*s.*

“PAUL FELTHOUSE.”

To this letter the nephew sent no reply; and on the 25th of February the sale took place, the horse in question being sold with the rest of the stock, and fetching 33*l.*, which sum was handed over to John Felthouse. On the following day, the defendant (the auctioneer), being apprised of the mistake, wrote to the plaintiff as follows:—

“Tamworth, February 26th, 1861.

“Dear Sir,—I am sorry I am obliged to acknowledge myself forgetful in the matter of one of Mr. John Felthouse’s horses. Instructions were given me to reserve the horse: but the lapse of time, and a multiplicity of business pressing upon me, caused me to forget my previous promise. I hope you will not experience any great inconvenience. I will do all I can to get the horse again: but shall know on Saturday if I have succeeded.

“WILLIAM BINDLEY.”

*871] *On the 27th of February, John Felthouse wrote to the plaintiff, as follows:—

“Bangley, February 27th, 1861.

“My dear Uncle,—My sale took place on Monday last, and we were very much annoyed in one instance. When Mr. Bindley came over to take an inventory of the stock, I said that horse (meaning the one I sold to you) is sold. Mr. B. said it would be better to put it in the sale, and he would buy it in without any charge. Father stood by whilst he was running it up, but had no idea but he was doing it for the good of the sale, and according to his previous arrangement, until he heard him call out Mr. Glover. He then went to Mr. B. and said that horse was not to be sold. He exclaimed he had quite forgotten, but would see Mr. Glover and try to recover it, and says he will give 5*l.* to the gentleman if he will give it up: but we fear it doubtful. I have kept one horse for my own accommodation whilst we remain at Bangley: and, if you like to have it for a few months, say five or six, you are welcome to it, free of any charge, except the expenses of travelling: and if, at the end of that time, you like to return him, you can; or you can keep him, and let me know what you think he is

worth. I am very sorry that such has happened; but hope we shall make matters all right; and would have given 5*l*. rather than that horse should have been given up.

"JOHN FELTHOUSE."

On the part of the defendant it was submitted that the letter of the 27th of February, 1861, was not admissible in evidence. The learned Judge, however, overruled the objection. It was then submitted that the property in the horse was not vested in the plaintiff at the time of the sale by the defendant.

A verdict was found for the plaintiff, damages 33*l*., leave being reserved to the defendant to move to enter *a nonsuit, if the Court should be of opinion that the objection was well [*872 founded.

Dowdeswell, in Michaelmas Term last, accordingly obtained a rule nisi, on the grounds that "sufficient title or possession of the horse, to maintain the action, was not vested in the plaintiff at the time of the wrong; that the letter of John Felthouse of the 27th of February, 1861, was not admissible in evidence against the defendant: that, if it was admissible, being after the sale of the horse by the defendant, it did not confer title on the plaintiff; and that there was at the time of the wrong no sufficient memorandum in writing, or possession of the horse, or payment, to satisfy the statute of frauds." *Carter v. Tous-saint*, 5 B. & Ald. 855 (E. C. L. R. vol. 7), 1 D. & R. 515 (E. C. L. R. vol. 16), and *Bloxam v. Sanders*, 4 B. & C. 941 (E. C. L. R. vol. 10), 7 D. & R. 396 (E. C. L. R. vol. 16), were referred to.

Powell showed cause.—There was an ample note of the contract in writing to satisfy the statute of frauds. When the parties met in December, 1860, it was agreed between them that the plaintiff should become the purchaser of the horse. It is true, there was a slight misunderstanding as to the price, the plaintiff conceiving he had bought it for 30*l*., the nephew thinking he had sold it for 30 guineas. On being apprised by the nephew that he was under a mistake, the plaintiff wrote to him proposing to split the difference, concluding with saying,—“If I hear no more about him, I consider the horse is mine at 30*l*. 15*s*.” The question is whether there has not been an acceptance of that offer by the vendor, though nothing more passed between the uncle and nephew until after the 25th of February, the day on which the sale by auction took place. Could the plaintiff after his letter of the 2d of January have refused to take the horse? It is true *that letter was unanswered; but it was proved that the nephew afterwards spoke of the horse as being sold to the [*873 plaintiff, and desired the auctioneer (the defendant) to keep it out of the sale. Although written after the conversion, the letter of the 27th of February was clearly evidence, and, coupled with the plaintiff's letter of the 2d of January, constituted a valid note in writing, even as between the uncle and the nephew. [KEATING, J.—You were bound to show a binding contract for the sale of the horse before the 25th of February.] The letter of the nephew of the 27th is an admission by him that he had before that day assented to the bargain with the plaintiff. [BYLES, J.—That only shows a binding contract on the 27th of February. What right had the plaintiff to impose upon the nephew the trouble of writing a letter to decline or to assent to the contract?] It was not necessary that he should assent to the

contract by writing: it is enough to show that he assented to it [BYLES, J.—There was no delivery or acceptance: and there could be no admission of delivery and acceptance. WILLES, J.—To be of any avail, you must make out a valid contract between the uncle and nephew prior to the 25th of February.] It was not necessary that the assent to the terms of the plaintiff's letter should be in writing. In *Dobell v. Hutchinson*, 3 Ad. & E. 355 (E. C. L. R. vol. 30), 5 N. & M. 251 (E. C. L. R. vol. 36), it was held, that, where a contract in writing, or note, exists which binds one party to a contract, under the statute of frauds, any subsequent note in writing signed by the other is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any contract which contains them. So, in *Smith v. Neale*, 2 C. B. N. S. 67 (E. C. L. R. vol. 89), it was held that a written proposal, containing the terms of a proposed contract, signed by the defendant, and assented to by the plaintiff by word of *874] mouth, is a sufficient *agreement within the 4th section of the statute of frauds. [WILLES, J.—That was a very peculiar case. The plaintiff had done all that she had agreed to do, and nothing remained to be done but performance on the defendant's part. But, to say that transactions between third parties are to be controlled or affected by an intermediate letter written by a person who is no party to the record, is a somewhat startling proposition. BYLES, J.—I feel great difficulty in seeing how the nephew's subsequent admission can be binding on the defendant, or even evidence against him.] It is enough that the memorandum relied on to satisfy the statute of frauds is made at any time before action brought: *Bill v. Bament*, 9 M. & W. 36.†

Montague Smith, Q. C., and *Dowdeswell*, in support of the rule.—The letter of the 27th of February was clearly inadmissible. The 17th section of the 29 Car. 2, c. 3, provides that "no contract for the sale of any goods, &c., shall be allowed to be good, except some note or memorandum in writing of the bargain be made and signed by the parties to be charged by such contract," &c. At the time the sale complained of here took place, there clearly was no binding contract for the sale of the horse by the nephew to the plaintiff. [WILLES, J.—Could the plaintiff have insured the horse on the 25th of February?] He could not: he had no insurable interest. [WILLES, J.—As to third persons, one cannot see any reason for giving a relation to the subsequent writing, though as between the immediate parties one can.] *Carter v. Toussaint*, 5 B. & Ald. 855 (E. C. L. R. vol. 7), 1 D. & R. 515 (E. C. L. R. vol. 16), is a far stronger case than the present. There, a horse was sold by verbal contract, but no time was fixed for payment of the price. The horse was to remain with the vendors for twenty days without any charge to the vendee. At the expiration of that time, the horse was sent to grass, by the direction of the vendee, and *875] by *his desire entered as the horse of one of the vendors; and it was held that there was no acceptance of the horse by the vendee, within the 29 Car. 2, c. 3, s. 17. And see *Smith's Mercantile Law*, 4th edit. p. 468 et seq. Here, the plaintiff had clearly no property in the horse on the 25th of February, the day of the sale by the defendant. How, then, can an admission ex post facto by a

stranger affect the relative positions of the parties to this record on that day?

WILLES, J.—I am of opinion that the rule to enter a nonsuit should be made absolute. The horse in question had belonged to the plaintiff's nephew, John Felthouse. In December, 1860, a conversation took place between the plaintiff and his nephew relative to the purchase of the horse by the former. The uncle seems to have thought that he had on that occasion bought the horse for 30*l.*, the nephew that he had sold it for 30 guineas: but there was clearly no complete bargain at that time. On the 1st of January, 1861, the nephew writes,—“I saw my father on Saturday. He told me that you considered you had bought the horse for 30*l.* If so, you are labouring under a mistake, for, 30 guineas was the price I put upon him, and you never heard me say less. When you said you would have him, I considered you were aware of the price.” To this the uncle replies on the following day,—“Your price, I admit, was 30 guineas. I offered 30*l.*; never offered more: and you said the horse was mine. However, as there may be a mistake about him, I will split the difference. If I hear no more about him, I consider the horse mine at 30*l.* 15*s.*” It is clear that there was no complete bargain on the 2d of January: and it is also clear that the uncle had no right to impose upon the nephew a sale of his horse for 30*l.* 15*s.* unless he chose to comply with the condition of writing to repudiate the offer. The nephew might, no doubt, have *bound his uncle to the bargain by writing to him: the uncle might also have retracted his [*876 offer at any time before acceptance. It stood an open offer: and so things remained until the 25th of February, when the nephew was about to sell his farming stock by auction. The horse in question being catalogued with the rest of the stock, the auctioneer (the defendant) was told that it was already sold. It is clear, therefore, that the nephew in his own mind intended his uncle to have the horse at the price which he (the uncle) had named,—30*l.* 15*s.*: but he had not communicated such his intention to his uncle, or done anything to bind himself. Nothing, therefore, had been done to vest the property in the horse in the plaintiff down to the 25th of February, when the horse was sold by the defendant. It appears to me, that, independently of the subsequent letters, there had been no bargain to pass the property in the horse to the plaintiff, and therefore that he had no right to complain of the sale. Then, what is the effect of the subsequent correspondence? The letter of the auctioneer amounts to nothing. The more important letter is that of the nephew, of the 27th of February, which is relied on as showing that he intended to accept and did accept the terms offered by his uncle's letter of the 2d of January. That letter, however, may be treated either as an acceptance then for the first time made by him, or as a memorandum of a bargain complete before the 25th of February, sufficient within the Statute of Frauds. It seems to me that the former is the more likely construction: and, if so, it is clear that the plaintiff cannot recover. But, assuming that there had been a complete parol bargain before the 25th of February, and that the letter of the 27th was a mere expression of the terms of that prior bargain, and not a bargain

*877] then for the first time concluded, it would be directly *contrary to the decision of the Court of Exchequer in *Stockdale v. Dunlop*, 6 M. & W. 224,† to hold that that acceptance had relation back to the previous offer so as to bind third persons in respect of a dealing with the property by them in the interim. In that case, Messrs. H. & Co., being the owners of two ships, called the *Antelope* and the *Maria*, trading to the coast of Africa, and which were then expected to arrive in Liverpool with cargoes of palm-oil, agreed *verbally* to sell the plaintiffs two hundred tons of oil,—one hundred tons to arrive by the *Antelope*, and one hundred tons by the *Maria*. The *Antelope* did afterwards arrive with one hundred tons of oil on board, which were delivered by H. & Co. to the plaintiffs. The *Maria*, having fifty tons of oil on board, was lost by perils of the sea. The plaintiffs having insured the oil on board the *Maria*, together with their expected profits thereon,—it was held that they had no insurable interest, as the contract they had entered into with H. & Co., being verbal only, was incapable of being enforced.

BYLES, J.—I am of the same opinion, and have nothing to add to what has fallen from my Brother Willes.

KEATING, J.—I am of the same opinion. Had the question arisen as between the uncle and the nephew, there would probably have been some difficulty. But, as between the uncle and the auctioneer, the only question we have to consider, is, whether the horse was the property of the plaintiff at the time of the sale on the 25th of February. It seems to me that nothing had been done at that time to pass the property out of the nephew and vest it in the plaintiff. A proposal had been made, but there had before that day been no acceptance binding the nephew.

*878] *WILLES, J.—*Coats v. Chaplin*, 3 Q. B. 483 (E. C. L. R. vol. 43), 2 Gale & D. 552, is an authority to show that John Felthouse might have had a remedy against the auctioneer. There, the traveller of Morrisons, tradesmen in London, verbally ordered goods for Morrisons of the plaintiffs, manufacturers at Paisley. No order was given as to sending the goods. The plaintiffs gave them to the defendants, carriers, directed to Morrisons, to be taken to them, and also sent an invoice by post to Morrisons, who received it. The goods having been lost by the defendants' negligence, and not delivered to Morrisons,—it was held that the defendants were liable to the plaintiffs.

Rule absolute.

END OF HILARY VACATION.

ADDITIONAL CASES

FROM

CONTEMPORANEOUS REPORTS.

Re WINTRINGHAM TITHES, Ex parte LORD CARRINGTON. *May 9, 1862.(a)*

By a private Act of Parliament, passed in 1762, for carrying into effect an agreement between the landowner and rector for the commutation of tithes on certain lands in the parish of W., it was declared that certain rents therein specified should be vested in the rector, in lieu of and as full compensation for all tithes of corn, grain, hay, wool, lamb, and all other tithes whatsoever, except as after mentioned, arising from all or any of the lands in the said parish, save and except marriage, churching, and burial fees, "provided that nothing in the Act should prejudice the right of the said rector, or his successors, to any marriage, churching, or burial fees, nor the right of tithes and customary stocking" in certain specified lands, "the modus in the Groves and Ancient Closes adjoining to the town, and all other petty and personal tithes not herein mentioned and relinquished, all which the said rector reserves, and they are hereby reserved to him and his successors in full right and in as ample manner as they have always been enjoyed." The Assistant Tithe Commissioner having decided that the said lands, called "the Ancient Closes," were not exempt from tithes,—Held, on motion for a prohibition, that the tithes of "the Ancient Closes" were not commuted or extinguished by the private Act of 1762, and therefore the jurisdiction of the Commissioners was not taken away by section 90 of the Tithe Commutation Act, 6 & 7 W. 4, c. 71.

Seemle—that, even if the tithes of wool and lamb were not included in the modus reserved to the rector, and were, therefore, extinguished by the Act of 1762, such partial extinguishment of tithes arising out of the lands would not satisfy section 90, so as to deprive the Commissioners of jurisdiction.

IN this case a rule had been obtained, on the part of Lord Carrington, as the owner of certain lands in the parish of Wintringham, Lincolnshire, called the Ancient Closes, calling on the Tithe Commissioners to show cause why a prohibition should not issue to restrain them from proceeding with the commutation of tithes payable out of such lands.

The rule was obtained on the ground that the Tithe Commissioners had no jurisdiction, as the tithes in respect of these lands had been extinguished, or commuted, by a private Act of Parliament, and section 90 of the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, exempts from the operation of that Act "any lands or tenements the tithes whereof shall have been already perpetually commuted or extinguished under any Act of Parliament." The private Act relied on by Lord Carrington was an Act passed in 1762, for giving effect to an agreement therein recited as having been made between the Countess Dowager of Scarborough and the Earl of Scarborough, the then landowners, of the one part, and the Rev. Thomas Adam, the then rector,

(a) 31 L. J. 274; 9 Jurist 277; 6 L. T. 820.

of the other part, by which certain lands were to be allotted to the rector, and certain rents were to be paid him annually in lieu of all the tithes, great and small, and of all the wool and lamb within the parish, except the meadow and pasture lands called the Composition, and the marsh, and of all right of common therein, except as therein-after excepted. The first clause of the Act ratifies this agreement, and a subsequent clause, after declaring that the lands given to the rector are in satisfaction and compensation for all glebe lands and right of common whatsoever belonging to him or his successors, states that the annual rents are "to be vested in him in lieu of and as an equivalent and full satisfaction and compensation of and for all tithes and tenths of corn, grain, hay, wool, lamb, and all other tithes and payments whatsoever, excepting as hereinbefore or after mentioned, growing, arising, renewing, or increasing out of or from all or any of the lands or grounds lying in the said parish of Wintringham, save and except marriage, churching, and burial fees, and other surplice fees." There is then the following proviso: "Provided always, that nothing in this Act contained shall prejudice the right of the said rector or his successors to any marriage, churching, or burial fees, or any other surplice fees, nor the right of tithes and customary stocking in the meadow grounds called the Composition, including the lands there embanked from the Humber, the right of tithes in the low pasture, the modus in the Groves and Ancient Closes adjoining to the town, and all other petty and personal tithes not therein mentioned and relinquished, all which the said Thomas Adam reserves, and they are hereby reserved to him and his successors in full right and in as ample manner as they have always been enjoyed."

By a subsequent Act of 1795 certain annual rents were made payable to the then rector in satisfaction of the tithes arising out of certain homesteads, gardens, and orchards in the parish of Wintringham, "save and except," *inter alia*, "the moduses as mentioned, expressed, and described in an Act of Parliament passed," &c. (giving the title of the Act of 1762), "in a place in the parish of Wintringham aforesaid, called the Groves, and the Ancient Closes adjoining the said town of Wintringham, and the usual and accustomed Easter offerings, marriages, churching of women, surplice fees, and mortuaries."

No evidence was given before the Assistant Tithe Commissioner of the payment of the modus, but Lord Carrington's agent set up a claim for exemption from tithes over the Ancient Closes by virtue of the said private Acts. It was also contended by him before the Commissioner, that as the modus had not been paid for thirty years the lands were exempt from the payment. The Assistant Commissioner decided that there was no such exemption from tithes as claimed, and he made his award accordingly.

Manisty (F. M. White with him) showed cause against the rule, and contended that the tithes of the lands in question had not been extinguished by the Act of 1762, such lands being excepted by the proviso.

The Court called on

Bovill and *Stephenson* to support the rule.—They contended that the Tithe Commissioners had no jurisdiction, as all the tithes had been extinguished by the Act of 1762, and the only right reserved to the

rector was a right to a then existing modus, and that at all events there was exemption from tithes in respect of wool and lamb, and that the 90th section of 6 & 7 Will. 4, c. 71, applied to deprive the Commissioners of jurisdiction over so much as related to the tithes for lamb and wool. They cited *Re Appledore*, 8 Q. B. 139 (E. C. L. R. vol. 55), s. c. 17 Law J. Rep. N. S. Q. B. 59, *Bunbury v. Fuller*, 9 Exch. 111,† s. c. 23 Law J. Rep. N. S. Exch. 29, and *Flanders v. Bunbury*, 9 Exch. 141,† note to *Bunbury v. Fuller*.

ERLE, C. J.—In this case a rule has been moved for, for a prohibition to the Tithe Commissioners, whose Assistant Commissioner has made a decision respecting the tithe of certain closes, called “the Ancient Closes,” in the parish of Wintringham, and the ground relied on in support of the rule is, that the tithes of the Ancient Closes have been commuted or extinguished by an Act of Parliament, and that the Commissioners have, therefore, no jurisdiction, because section 90, of the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, says that nothing in that Act contained shall extend to lands the tithes whereof have been commuted or extinguished under some Act of Parliament. Then, have the tithes of the Ancient Closes been commuted or extinguished under any Act of Parliament? It has been contended that the Act of 1762 has that operation. That Act carries into effect an agreement made between the landowner on the one side and the then rector of the parish on the other side, and which may be taken to be an agreement for a commutation and full satisfaction for all the tithes on certain lands of the parish, except as therein excepted. Then follows a proviso, “that nothing in this Act contained shall prejudice the right of the said rector” to the modus in the Ancient Closes. Now it seems to me that the Act does not extinguish the tithes of the Ancient Closes. It reserves the right of the rector and creates no new modus. Then, is there a modus in respect of the Ancient Closes? Now, if a party is entitled to receive a modus in lieu of tithes the burthen of proof to establish the existence of the modus is cast on the party who claims the exemption from tithes by reason of the modus. In the present case, if Lord Carrington intended to rely upon the modus, it was, as it seems to me, for Lord Carrington to establish that the modus existed. No evidence, however, was offered on the subject; but Lord Carrington claimed that the closes had become absolutely exempt by reason of the Tithe Prescription Act, which says, if nothing has been paid in lieu of tithes for thirty years or sixty years the land shall be absolutely exempt. In my view of the Act of 1762 the applicant failed to establish that the tithes of the Ancient Closes were perpetually commuted or extinguished by that Act of Parliament. If so, the Tithe Commissioners had jurisdiction, and then, as no evidence was offered, the Assistant Tithe Commissioner had, as it seems to me, a right to come to the decision he came to, namely, that it was not proved before him that the lands were exempt by Act of Parliament. The only point for us to consider is the jurisdiction of the Commissioners. We have nothing to do with the correcting of the decision which has been come to with reference to the claim of Lord Carrington, that under the Tithe Prescription Act the lands had become exempt, because nothing had been paid for thirty years. I think the decision of the Commissioner was a limited decision, deciding that there was no

exemption on payment of a *modus*. The correctness or not of the decision does not affect the question of jurisdiction of the Commissioner over the subject-matter upon which he was to decide. A great deal has been said on the second and minor point, that at all events the tithes of wool and lamb had been perpetually extinguished in these lands by the Act of 1762. One answer to that, I think, is, that the words "except as hereinafter excepted," relate to the clause claiming in favour of the rector the exemption of the *modus* of the Ancient Closes, and I consider that that *modus* was probably a *modus* in lieu of tithes of wool and lamb as well as of all other kinds of tithes, and so that would be exempted from the Act. I am, moreover, by no means clear that section 90 of the Tithe Commutation Act extends to take lands out of the jurisdiction of the Tithe Commissioners, where there has been only a partial extinguishment of some limited kind of tithe, leaving the lands liable to tithes in all other respects; but, be that as it may, I think on the construction of the Act of 1762 the *modus* probably excepted these lands from wool and lamb. The question, however, can be raised before the Commissioners, when the other proceedings in the matter are taken. In my opinion, this rule ought to be discharged.

WILLES, J.—I am of the same opinion. With respect to the first point made in the argument, it turns upon the assertion that the tithes of the lands have been already perpetually commuted or extinguished under an Act of Parliament. Well, in one sense, if the tithes were given up for a perpetual *modus* which was in existence at the time, you might say the tithes were extinguished. I do not think this is at all the sense in which the word "extinguished" is mentioned in the Tithe Commutation Act. I should think if such a *modus* had been made under the Act of Parliament the tithe might be said to be commuted, and then it might come under the term "commuted" instead of under the word "extinguished." That brings me to consider whether the *modus* is created by the Act of Parliament of 1762 or one to which statutory force is given by the Act. Now, I apprehend it is quite clear that it is not. The Act of Parliament deals with certain tithes, and provides for their perpetual commutation in consideration of certain money payments; but with regard to the lands in question, "the Ancient Closes," and also with respect to other land, called "the Groves," and further with respect to certain personal tithes, it provides that the right to the *modus* in respect of the Groves and the Closes and the personal tithes, should not be affected by the Act of Parliament. The Act goes on to say, "all which the rector reserves, and they are hereby reserved to him and his successors in full right and in as ample manner as they have always been enjoyed." Whatever may be the language employed, the true effect of it is that the enactments in this Act of George the Third are not to apply to that property at all. That really is so with respect to those personal tithes; they remain just the same, and therefore the tenants are subject to the same provision as they were before the Act passed. With respect to the *modus*, just consider for one moment the condition of the rector. If there was a valid *modus*, which was a *modus* binding on both parties, of course the only remedy for the rector would be in the spiritual Court; he would proceed in the spiritual Court, and he would enforce

his *modus*. If the *modus* was invalid, the rector would proceed by bill in equity for the subtraction of tithes, and the defendant must then have to state in his answer the existence of the *modus*, and further show by such answer that the *modus* was one sustainable in point of law. Now, what is the situation in which it is suggested this Act of Parliament places the rector? It is that he is bound to show the *modus* was valid, that he is to preserve to all time the evidence to show what were the terms upon which the *modus* was established,—in other words, that the burthen of establishing the exemption from tithes is transferred from the landowner to the rector. That is in violation of a principle which is, I suppose, as old as the period at which the Church first began to acquire property, namely, that these corporations sole, rectors, and others who have property in the Church, may improve the property which they so have, and hand it down to their successors in an improved state, but are not capable of handing it down in a deteriorated state; and I cannot conceive that the legislature should have intended this rector to take upon him the burthen for all time of preserving such evidence, or as the only alternative, that he should lose the tithes altogether. If that were intended, I have no doubt the legislature would not have used the language in question, which amounts to nothing more than this, that the Act does not interfere with the *modus* affecting the Ancient Closes. That being so, it is clear the 90th section is inapplicable in respect of the tithes being perpetually commuted by Act of Parliament. With respect to the tithes of wool and lamb, it is contended they were commuted throughout the whole parish. I apprehend that it is impossible to say that without seeing what the *modus* was; and I think if it appeared that it was a *modus* applicable to all tithes except of wool and lamb, there might be then a strong argument that the Act of Parliament took away those tithes; but if it was a *modus* in respect of all tithes, the Act of Parliament would not at all apply. In the absence of such evidence, I can only apply the rule that words general and words universal *prima facie* mean the same thing; that is, that the *modus*, in respect of the tithes, means in respect of all the tithes of the Ancient Closes. If that were not so, still I say the prohibition ought not to go, because I think with my Lord that section 90 of the Tithe Commutation Act means lands the whole tithes of which have been commuted or extinguished. That section excepts, in terms, such lands or tenements; therefore, they must either be within or without the jurisdiction of the Commissioners, and unless the whole of the tithes of such lands or tenements have been commuted or extinguished, they have not, I think, been commuted or extinguished for the purpose of that Act of Parliament. Then, if that be so, the utmost that can be said on the part of the applicant is, that the Assistant Commissioner has put a wrong construction upon the Act of George the Third in respect of the wool and lamb. For the reasons I have already stated, I am by no means prepared to say he has put a wrong construction upon it, but I am disposed to think he has put the right one upon it. For these reasons I think that this rule ought to be discharged.

BYLES, J.—I am of the same opinion. We have nothing here to do with the merits of the decision. The ground upon which the application was made (the only ground on which the rule can be sup-

ported) is that these Ancient Closes are, under the circumstances, forbidden ground, upon which the Assistant Commissioner has no right to enter, because the tithes there have been commuted by Act of Parliament, as the 90th section of the General Tithe Commutation Act provides, as to the general jurisdiction of the Commissioners, that "nevertheless this jurisdiction shall not extend to any lands or tenements the tithes whereof shall have been already perpetually commuted or extinguished under any Act of Parliament hereinbefore made." I very much doubt whether that proviso applies to such a case as this. It seems to me it applies chiefly to the compulsory Acts where the tithes are either extinguished and a glebe given in place of them, or else they are commuted for rent payable in money, or more usually in kind, and in that sense the word "commutation" is used, not only in the title, but in the various sections in the Tithe Commutation Act itself. But still, no doubt, it is open to Mr. *Bovill* to contend that this local Act of Parliament has made a commutation of the tithes within the meaning of that section. Now it seems to me it has not commuted the tithes and did not create a modus. It is plain it deals with the modus as a payment already existing. If it had created a modus, it would have created it by some reservation or exception, or other enactment in favour of the landowner. But here the proviso is, "provided always, that the moduses in the Ancient Closes are reserved to the rector in full right and in as ample manner as they have always been enjoyed." That is simply a reservation to the clergyman of the payment of the modus. It would be very odd, indeed, to create such a modus as that in the reservation or provision, and it is plain on looking at this Act of Parliament that this Act deals with the modus as a thing already existing, and it provides that notwithstanding that and other provisions in the Act of Parliament the clergyman of the parish shall receive the payment of it. Well, then, if it is not created by any Act of Parliament, it cannot in any sense be said to be a commutation of tithe within the 90th section. The only doubt I have entertained at all in the course of the inquiry is as to the point which is now raised for the first time, but which was not raised when the rule was moved for, with respect to the tithes of wool and lamb. But I think the term "modus" comprehends here a compensation for all the tithes in the Ancient Closes; and that being so, there was an extinguishment of the tithes of wool and lamb all over the parish, including those closes subject to the payment of the modus thereinbefore existing; and that being so, it seems to me, without expressing any opinion upon the question on which my Lord and my Brother Willes have spoken, as to the effect of a partial extinguishment of some tithes, that there is no part of the tithes of these Ancient Closes which are not subject to the jurisdiction of the Commissioners. It is not necessary for us to go even so far as that. It lies on the party applying for the prohibition to satisfy us that the Assistant Commissioner has exceeded his jurisdiction, and I think he has shown very clearly that he has acted within it. Whether he acted rightly or not is a matter on which I give no opinion.

KEATING, J.—I am entirely of the same opinion. I think it is clear the terms of the Act of 1762 did not affect either the extinguishment or perpetual commutation of the tithes in the land in question. For

the reasons already given, it seems to me that even if the Act did not bear that construction which I think it does, in respect of the tithe of lamb and wool, that is excluded in the modus with respect to the Ancient Closes. If it did not bear that construction, I agree with what has fallen from my Brother Willes, that that partial exemption could not, under the 90th section of the Tithe Commutation Act, have taken away the jurisdiction of the Assistant Commissioner.

Rule discharged, with costs.

PELLATT *v.* BOOSEY. *May 10, 1862.(a)*

The plaintiff, who had leased premises to B. for a term of years, which was unexpired at B.'s death, afterwards, in the belief that no one would administer to B.'s estate, agreed with B.'s son for him to occupy the premises as a yearly tenant, at the rent reserved by the lease to B. The son accordingly occupied and paid rent. The plaintiff repaired the premises shortly before Michaelmas, 1861, and having afterwards discovered that the defendant, a daughter of B., was the administratrix to his estate, and, as such, claimed to hold the premises for the remainder of the term under B.'s lease, the plaintiff sued her on the covenant in the lease to repair, and also brought ejectment for forfeiture for non-repair. In the action on the covenant the defendant paid a sum of money into Court, which the plaintiff accepted in satisfaction. There was no want of repair to the premises after the plaintiff had so repaired them, and the rent due up to Michaelmas, 1861, was paid by B.'s son, and received from him by the plaintiff before either action:—Held, in the action of ejectment, that either the rent paid by B.'s son was to be taken in satisfaction of the rent under the lease, and so there had been a waiver of the forfeiture, or else there had been an eviction of the defendant by the plaintiff which would prevent his taking advantage of a forfeiture for non-repair during such eviction.

Held also, per Erle, C. J., and Byles, J., that the statement in the plaintiff's declaration in the action on the covenant, that the breach for non-repair occurred during the existence of the term, was a further ground against the plaintiff recovering in ejectment.

THIS was an action of ejectment to recover the possession of the first floor and upper part of a house in St. Mary-at-Hill, in the city of London.

The plaintiff had granted a lease of the premises in question, in August, 1859, to a Mr. George Brocket Boosey, the father of the defendant, for a term of years, of which twelve years were still unexpired. The said G. B. Boosey died in November of the same year, intestate, and the defendant (Charlotte Boosey), in the following month of December, took out letters of administration to the estate of her said father. In January, 1860, Charles Boosey, who was a son of the said G. B. Boosey, called upon the plaintiff and asked to be allowed to remain as tenant of the premises at the same rent as his late father had held them, and it was on that occasion agreed between them that C. Boosey should occupy as yearly tenant at the same rent as reserved by the lease, namely, 50*l.* a year. The plaintiff was not then aware that administration had been taken out to the estate of the said G. B. Boosey; on the contrary, he was told by C. Boosey that his father had died insolvent (which was not true), and that there would be no administration. C. Boosey paid the rent quarterly, the last of such payments being the quarter's rent to Michaelmas, 1861, and which the plaintiff received on the 25th of October following. An action of ejectment having been brought in June, 1861, against the plaintiff by the reversioner, for breach of the plaintiff's covenant to repair, the

(a) 31 L. J. 281; 8 Jurist 1107.

plaintiff settled that action by putting the premises into repair, which he did to the satisfaction of such reversioner before the 29th of September, 1861. The plaintiff afterwards sold his lease by public auction, when, for the first time, he became aware that the defendant, as administratrix to her father's estate, claimed to hold under the lease of August, 1859, which accordingly disabled the plaintiff from completing his contract of sale. He thereupon sued the defendant in an action of covenant for not repairing the premises, in which action the defendant paid a sum of money into Court, which the plaintiff accepted in satisfaction. This action of covenant was commenced in December last, and in the same month he brought the present action of ejectment for breaches of covenant, the main breach relied on, and the only one necessary to refer to for the purpose of this report, being the breach for non-repair.

The action was tried, before Byles, J., at the London Sittings after Hilary Term last, when a verdict was found for the plaintiff, with leave for the defendant to move to set the same aside, and enter it for the defendant, on the ground that there had been a waiver of the forfeiture for non-repair.

A rule *nisi* to this effect having been obtained,

Collier and *Philbrick* now showed cause.—The only question is, whether there has been a waiver of the forfeiture for non-repair, and the waiver which is relied on by the defendant is the acceptance of the rent up to Michaelmas, 1861. Now, what the plaintiff so received was from C. Boosey, who, as it now turns out, was a wrongdoer, and had, in fact, obtained possession of the premises by a fraud on the plaintiff. C. Boosey was no tenant, except by estoppel, and that would only be as between him and the plaintiff, and no payment of rent by C. Boosey could be a payment under the lease. [ERLE, C. J.—Could not the defendant adopt such payment by her brother, as rent paid under the lease?] It is submitted she could not, as it was not paid on her behalf, or professed to be so paid. [BYLES, J.—The action of covenant which was brought against the defendant admits that the tenancy was in existence at the time the repairs were wanting.] The landlord may bring ejectment, notwithstanding he has also brought an action for damages for breach of covenant. With respect to the payment of rent it may be shown under what circumstances it was paid—*Doe d. Lord v. Crago*, 6 C. B. 90 (E. C. L. R. vol. 60), s. c., 17 Law J. Rep. N. S. C. P. 263, and *Fenner v. Duplock*, 2 Bingh. 10 (E. C. L. R. vol. 9); and here it was clearly shown to have been made not on behalf of the defendant. The case of *Williams v. Bartholomew*, 1 Bos. & P. 326, was the converse of the present case; and there Buller, J., said: "If money be paid to A. by the direction of B. it is a good payment to B., but I can never agree that if money be paid A. simply with the knowledge of B., it will be a payment to B." "Knowledge will not do; there must be consent, direction, and authority." They referred also to *Croft v. Lumley*, 5 El. & B. 648 (E. C. L. R. vol. 85), s. c. 27 Law J. Rep. N. S. Q. B. 321.

Cleasby (*Turner* with him), in support of the rule.—There was here either an eviction or not. If there was an eviction there would be no forfeiture for which the landlord could bring ejectment, and if there was no eviction, what took place amounted to a satisfaction of the

rent under the lease, and was, therefore, a waiver of the forfeiture for non-repair. It is submitted that as long as a tenant is evicted by the landlord, the right of the landlord to insist on a forfeiture for non-repair is gone; for if a tenant could not enter to do the repairs, the landlord clearly ought not to insist on a forfeiture for not repairing. It is true the tenant may be liable on his covenant to repair, but that is very different to a forfeiture of the term, and it would be most unreasonable if it were otherwise, and a landlord were enabled to take advantage of his own wrong. In *Doe d. Knight v. Rowe*, 1 R. & M. 343 (E. C. L. R. vol. 21), there was a lease, with a covenant to insure in the joint names of the landlord and the lessee. The lease had been assigned and the landlord had induced the defendant to suppose that an insurance in one name only was sufficient, and an ejectment having been brought for a forfeiture incurred by insuring in the defendant's name only, Lord Tenterden directed the jury to find for the defendant if they were of opinion the landlord's conduct was such as to induce a reasonable person to believe that such an insurance was sufficient. Then there was a waiver here by the payment of rent. There cannot be two rents in respect of the same premises, and the rent which was paid must be taken to be in satisfaction of the rent under the lease. (He was then stopped by the Court.)

ERLE, C. J.—This is an action of ejectment by a landlord against the daughter and administratrix of his deceased tenant, and the question is whether there has been a forfeiture of the term, and the only forfeiture which is relied on is one for non-repair; but as the premises were put into repair in September, 1861, it is clear that there can be no forfeiture for non-repair after that time. Then, was the continuance of the term recognised by the landlord after he had had knowledge of the forfeiture? And that brings one to the question, was the rent up to Michaelmas, 1861, paid by the tenant? for if it was the forfeiture would be waived and gone. Now, it appears that the brother of the defendant had applied to the plaintiff to be allowed to continue in possession, and had been accepted as tenant, when the sister was administratrix and had the term. Then the premises, having been out of repair, were put in repair by Michaelmas, 1861, up to which time the brother paid the rent. The question is, was the payment of that rent a payment by the sister, who was the real tenant? I think that the effect of the transaction was, that the plaintiff, as landlord, was willing to let the brother be in possession, and to take the rent under the lease from him in discharge of the sister, who would, as administratrix, have been liable. If this be so, then the payment by the brother was a payment on behalf of the sister, but if this be not sound reasoning, then the plaintiff, as landlord, must be considered to have evicted the defendant during the term, and to have put another tenant in possession. As the plaintiff put the defendant's brother in as tenant, and the brother continued in possession during all the time there was any breach of the covenant to repair, I am of opinion that he cannot succeed in ejectment, since he cannot go for any breach arising from non-repair during the time he so kept the tenant out of possession. It is true that the tenant in such case may be liable in an action on the covenant to repair, but the landlord cannot take advantage of his own wrong, and say that the term has been forfeited.

Moreover, if the tenancy continued to Michaelmas, 1861, the forfeiture for non-repair would have been waived. Now, in the action of covenant for not repairing, the landlord declared the breach to be during the tenancy, and the defendant paid money into Court in satisfaction of such damage, which the plaintiff accepted. Therefore, there are, I think, these three grounds against the landlord sustaining this action.

WILLES, J.—I am of the same opinion. It appears that the repairs were completed before Michaelmas last, and that the rent due up to Michaelmas was paid to and accepted by the landlord. Now, if that rent was paid under the lease, there is no doubt but that there has been a waiver. One must look to the origin of the letting to the brother, to see whether there has been a satisfaction of the rent under the lease, and if one does so, it will be manifest that either the landlord was to receive two rents, or else the rent paid by the brother was to be in satisfaction of the rent under the lease. Now, obviously, the latter is the true state of the case, and the payment would clearly be in such satisfaction if the administratrix assented to the payment being so made. It may, I think, well be concluded that she did so assent, and then the payment of rent which was made by the brother in October, was a payment under the lease, and so there has been a waiver of the forfeiture for not repairing. When I say it depends on whether she so assented, I say so against my own notion of what I think the law ought to be, but in accordance with the decisions on the subject. Assuming, however, that she did not assent, then there was clearly an eviction by the landlord. An eviction of a house must have the effect of making performance of a covenant to repair very onerous, and is within the principle of the case cited by Mr. *Cleasby*, and although the tenant may be liable notwithstanding to an action of covenant to repair, such an eviction may be considered as a waiver by the landlord of his right to take advantage of the condition of re-entry. In 1 Roll. Abr. 453, there is put this case: "If a condition be to repair a house, he (the obligor) is excused if a stranger, by the command of the obligee, disturb him, and will not suffer him to do it." I, therefore, think this rule should be made absolute.

BYLES, J.—I agree with the rest of the Court; but I think, according to the view I took at the trial, there is a short mode of disposing of this question. The plaintiff had brought an action of covenant against the defendant, and in that action he had described the breach for non-repair as occurring "during the existence of the term." The term, therefore, was acknowledged by him to exist down to the end of the existence of the state of non-repair, and that existed to near Michaelmas last, and there has been none since. I think this is an additional ground for saying that the plaintiff is out of Court in this action.

KEATING, J.—I concur in thinking that this rule should be made absolute. There was either an eviction or that which amounted to a waiver of the forfeiture. If there was an eviction, I agree with the rest of the Court that the landlord could not treat the non-repair, during the period of such eviction, as a forfeiture of the term, and if there was no eviction, then I think that the arrangement which was come to between the plaintiff and the defendant's brother, was such as

would make the payment of the rent by the brother, a payment under the lease, and so there was a waiver of the forfeiture.

Rule absolute.

BERNARD v. AARON and SHARPLEY. June 27.(a)

A. and B. were joint owners of a ship; A. working the ship, defraying all the expenses, and taking the uncontrolled management of her, and paying himself by taking two thirds of the gross earnings; B. taking the remaining one third as his portion:—Held, that the result of these facts was, that A. was a hirer of the share of B., and not the servant or agent of B., so as to render B. liable in an action of tort for damages caused by the negligence of A.

THIS was an action for negligence, tried before Byles, J., at the Sittings at Westminster in last Easter Term. The declaration was in the common form against the two defendants for negligence. Plea, not guilty. The second count was abandoned. The facts were these: that the defendants were joint owners of the trading vessel *The Alpha*. The vessel was worked by Aaron on a principle well known among shipowners, called "thirds," under which Aaron took two-thirds of the total gross earnings of the ship, and Sharpley one-third, Aaron taking upon himself all the liabilities and expenses of the ship. In June, 1860, *The Alpha* was at Falcon Dock, in the Thames, unloading timber into the plaintiff's cart, when, from a deficiency in the tackle, a large piece of timber fell on two of the plaintiff's horses, and seriously injured them. For this injury the present action was brought to recover damages; and at the trial the jury found a verdict for the plaintiff for 20*l*. It was objected, that on the above facts, Aaron alone was responsible for the state of the ship's tackle, and that Sharpley was not in any way responsible for the negligence of Aaron; and leave was reserved to move to set aside the verdict as against Sharpley, and to enter it for him.

Kemplay, having moved accordingly in Trinity Term, had obtained a rule nisi; and now

Day showed cause.—It is not contended that if the ship were chartered to a stranger, the part owners would be liable for the negligence of the charterer; but this is a case of partnership, and *Ashworth v. Stanbix*, 30 L. J. Q. B. 183, s. c., 7 Jur. N. S. 467, shows both to be liable. *Ogle v. Barnes*, 8 T. R. 188; *Moreton v. Hardern*, 4 B. & C 223 (E. C. L. R. vol. 10).

Kemplay, in support of the rule, referred to Lindley on Partnership 11–30, and French v. Styring, 2 C. B. 357 (E. C. L. R. vol. 52).

WILLIAMS, J.—I am of opinion that this rule should be made absolute. There is no dispute about what the law of the case is; the only doubt raised is, what is the true result of the facts laid before the jury. It is not disputed, that if the facts be taken to be that Aaron hired Sharpley's share of the ship at a rent of one-third of its gross earnings, Sharpley is, in that case, not liable for the negligence of the master, who, under these circumstances, is exclusively the servant of Aaron. On the other hand, if the result of the facts is, that there was

one management of the ship under certain terms as to earnings, then Aaron would only be the agent of Sharpley, and Sharpley would be responsible for the acts of Aaron and the master; and I am of opinion that the true result of the facts before us is, that Aaron hired the ship from Sharpley, and that Sharpley is not liable for the negligence which caused this accident.

WILLES, J.—I am of the same opinion. At first sight I thought the transaction looked very like appointing Aaron ship's husband: his duties as described are like those of a ship's husband, and as such his acts would bind the owners. But then it appears that he takes upon himself the liabilities of the vessel, which a ship's husband never does; and that, therefore, shows that he is not a ship's husband. One who is bound to hand over to the owner a fixed sum, or a fixed proportion of the earnings of the ship, is not a ship's husband; he is not the agent of the owners, but a person who works the vessel on his own account. That is the result of the facts of the case; and I think, therefore, that Sharpley in this action is entitled to a verdict.

BYLES, J.—I am of the same opinion, but not without some degree of doubt. The question is not, whether the defendant would be responsible in an action *ex contractu*; the question before us is, whether he is liable in this action *ex delicto*—i. e., whether Aaron is agent to Sharpley? and I think he is not the servant or agent of Sharpley. It seems to me that Aaron is the hirer of the ship, paying for that hire by uncertain payments calculated by the gross earnings of the ship. The fact of their being uncertain does not, I think, alter the effect of the material facts of the case. By the agreement between him and Aaron, Sharpley divested himself of all power of appointing the master and crew; and that being so, he is not to be made liable for acts of those over whom he could exercise no control whatever.

KEATING, J., concurred.

Rule absolute.

LASCARIDI v. GURNEY. June 27.(a)

By deed, dated the 2d March, 1861, between G. P. L., A. B. M., C. P. V., J. C., and R. J. R. (the plaintiffs in this action) of the first part; S. G., H. E. G., D. W. C., A. G. C., and R. B. (the defendants), of the second part; and one A. J. of the third part, it was recited that the plaintiffs G. P. L. and J. C. had for some time past carried on business in partnership as commission merchants at Fen Court, Fenchurch Street, in the city of London, under the style or firm of M. & Co., and at Glasgow, under the style or firm of C. P. V., and at Gibraltar, under the style or firm of J. C. & Co.; and that the said plaintiff G. P. L. had also for some time past carried on business as a commission merchant at Bucklersbury, in the City of London, and also at Manchester, under the style or firm of G. L. & Co.; and that the said plaintiffs G. P. L. and R. J. R. had for some time past carried on business in partnership at Liverpool, under the style or firm of G. L. & Co.; and that the said G. P. L. had also carried on business in partnership with one S. K. and one A. X., in Fenchurch Street aforesaid, under the style or firm of "The Greek and Oriental Steam Navigation Company." The plaintiffs, having determined to dissolve the said several partnerships, and to wind up and close the business of all the said firms, and in order to provide the necessary means, applied to the defendants for advances for this purpose, and furnished the defendants with a statement of account that the whole of the said debts and liabilities did not exceed the sum of 123,580*l.*; and the credits and assets of the said several firms were estimated to exceed 87,000*l.*; that the defendants consented to give such assistance, and to make the necessary advances, upon having the same secured by an assignment to a trustee of all the assets, &c., of the several firms aforesaid, and all other property of the plain-

tiffs, or any of them, save and except as thereafter mentioned; and that the defendants had named the said A. J. to be such trustee, and that the defendants had made certain advances for the purposes aforesaid. Averment, that by the said deed they (the plaintiffs), and every one of them, according to their respective interests, assigned to the said A. J., &c., his executors, &c., all the stock in trade, goods, merchandise, money, book or other debts, bills of lading, and securities of whatever nature, and all other property, real and personal, not only at London, but in all other places wheresoever, and of whatever nature the same might be, of the plaintiffs, or of any one or more of them, in which they, or any one or more of them, might be interested, save and except the leasehold, furniture, plate, &c., and all other the property and effects of the plaintiffs in and upon their respective dwelling-houses or places of residence, and save and except all other the separate estate and effects of the said plaintiffs A. B. M., C. P. V., J. C., and R. J. R., belonging to each of them respectively; and also save and except all right, title, and interest in the premises situated in Bothwell Street, Glasgow, wherein the business of the said firm of C. P. V. had been recently carried on, to have and hold the same, except as above excepted, to the use of the said A. J., his executors, &c., absolutely, but in trust, nevertheless, to sell, or otherwise collect and realize and convert into money, all the premises thereby assigned, and from and out of the proceeds thereof, and also out of a sum of 1000*l.* hereinafter mentioned, and all such money as should be received as part of the assets of any of the said firms, &c., to pay the expenses of preparing the said deed, and all other deeds or instruments, &c., and all expenses incurred in and about the execution of the said trust, it being intended that the assignment thereby made, and the keeping of the covenants therein contained by the several plaintiffs, should exonerate them from all claims in respect of the said firm, as well amongst each other as by the defendants. And it was also in and by the said deed further provided, that at the expiration of one year from the date of the said presents, unless all claims of the defendants should first have been satisfied out of the assets of the said firms, or other money received under the said trust, and all liabilities of the said firms should have been discharged, then, in case any part of the assets should not have been completely realized, it should forthwith be valued by a firm of accountants, who should state the amount of deficiency or surplus, as the case might be, &c., and the surplus over and above the claims should be held in trust by the said A. J. for the defendants, and at their disposal. Then a power was given to the defendants to extend the time for such valuation. Then the deed declared that a sum of 1000*l.*, therein agreed to be paid by the said plaintiff C. P. V. to the said A. J., should, when so paid, be held subject to the trust therein contained. The defendants, by the said deed, covenanted, jointly and severally, that they would make advances, &c., as aforesaid, so as to enable the said trustee to wind up the business of the said several firms; but such advances were not, together with the advances then already made, to exceed the sum of 123,500*l.*, unless the defendants should think proper. In an action by the plaintiffs against the defendants for a breach of covenant in not making advances, &c., to which they pleaded, that after the execution by the others, J. C. had refused, and still refused, to execute the deed—Held, a good answer to the action, for that the deed was inoperative unless executed by each of the parties to it.

DECLARATION.—G. P. Lascaridi, A. B. Manuel, C. P. Varsami, J. Collingwood, and R. J. Richards, sue S. Gurney, H. E. Gurney, D. W. Chapman, A. G. Chapman, and R. Birkbeck, for that by deed made and entered into on the 2d March, 1861, between the plaintiffs of the first part, the defendants of the second part, and one Angus Jennings of the third part, it was recited that the plaintiffs G. P. Lascaridi and J. Collingwood had, for some time past, carried on business in partnership as commission merchants, at Fen Court, Fenchurch Street, in the city of London, under the style and firm of Manuel & Co., and at Glasgow, under the style or firm of C. P. Varsami, and at Gibraltar, under the style and firm of J. Collingwood & Co.; and that the said plaintiff G. P. Lascaridi had also, for some time past, carried on business as a commission merchant at Bucklersbury, in the city of London, and also at Manchester, under the style or firm of G. Lascaridi & Co., and that the said plaintiffs G. P. Lascaridi and R. J. Richards had for some time past, carried on business in partnership as commission merchants, at Liverpool, under the style or firm of G. P. Lascaridi & Co.; and that the said plaintiff G. P. Lascaridi had also carried on business in partnership with one Stefanos Xenos and one Aristixes

Xenos in Fenchurch Street, in the city of London, under the style or firm of "The Greek and Oriental Steam Navigation Company." And also, that the plaintiffs had determined to dissolve the several partnerships aforesaid, and to wind up and bring to a close the business of all the said several firms, but being unable to meet their engagements without considerable advances of money, had applied to and requested the defendants to make advances, and to assist them in winding up the business of the said several firms, and had furnished the defendants with a statement of account showing the debts and liabilities, and also an estimate of the value of the credits and assets of the said several firms, which they allege to be a correct statement and estimate; and whereby it appeared that the whole of the said debts and liabilities did not exceed the sum of 123,580*l.*, and that the credits and assets of the said several firms, if and when the same could and should be realized and converted into money, were estimated to amount to upwards of 87,000*l.*, and that the defendants consented and agreed to give such assistance as aforesaid, and to make the necessary advances upon having the same secured by an assignment to be made to a trustee of all the assets and property of the said several firms, and all other property of the plaintiffs, or any of them, save and except as hereinafter mentioned; and that the defendants had named the said A. Jennings to be such trustee; and that the defendants had made certain advances for the purposes aforesaid. And the plaintiffs say, that in and by the said deed, and in pursuance of the said agreement, and in consideration of the premises and of the covenants thereinafter contained and hereinafter mentioned on the part of the defendants, they, the said several plaintiffs, and every one or more of them, according to their respective interests, granted, assigned, and transferred unto the said A. Jennings, his executors, administrators, and assigns, all the stock in trade, goods, merchandise, money at the bankers, or elsewhere, book and other debts, bills of lading, bills of exchange, books of account, vouchers, and securities of what nature soever, and all other the property, credits, assets, estate and effects, real and personal, not only at London, Glasgow, Liverpool, Manchester, and Gibraltar, but in all other places wheresoever, and of whatever nature the same might be, of the plaintiffs, or of any one or more of them, in which they, or any one or more of them, might be interested; and all their or his right, title, or interest therein, save and except the leasehold, furniture, plate, linen, wearing apparel, and all other the property and effects of the plaintiffs, in and upon their respective dwelling-houses or places of residence of any of the said firms, which it was thereby declared and agreed that they, and each of them, should be at liberty to retain for their own use, and save and except all other the separate estate and effects of the said plaintiffs A. B. Manuel, C. P. Varsami, J. Collingwood, and R. J. Richards, belonging to each of them respectively and individually, apart from the assets or property of their said respective firms; and also save and except all right, title, and interest in the premises situate in Bothwell Street, Glasgow, wherein the business of the said firm of C. P. Varsami had been recently carried on, and which premises were then held on a tack or lease, dated the 7th and 15th June, 1859, granted to the said C. P. Varsami for a term of years, of which six years were unexpired, at

the annual rent of 580*l.*, to be increased as in the said lease mentioned ; to have, hold, and receive the same, except as above excepted, to the use of the said A. Jennings, his executors, administrators, and assigns absolutely, but in trust nevertheless to sell or otherwise dispose of, collect, and get in, realize, and convert into money, all the premises thereby assigned, or intended to be assigned, which should not consist of money, at such times and in such manner, and with as little delay, as to the said A. Jennings, his executors, administrators, or assigns, should seem expedient ; and from and out of the proceeds thereof, and also out of a sum of 1000*l.* to be paid to the said trustee by the said plaintiff C. P. Varsami, and all such money as should be received as part of the assets of any of the said firms, or in any way under or by virtue of those presents ; in the first place, to pay the expenses of preparing those presents, and all other deeds or instruments made or entered into in connection therewith, or for securing the said advances, or incurred in or about the same ; and the expense of preparing accounts, investigating affairs, and carrying on negotiations in reference thereto, and all expenses incurred in and about the execution of the said trust, and all such commission or other remuneration as should from time to time be allowed him by the defendants ; and then from time to time till all the liabilities of the said firms should have been discharged, to pay over to the defendants, or apply, in such manner as they might direct, all money which should come into the hands of the said A. Jennings, his executors, administrators, or assigns, by virtue of those presents ; and when and after all the liabilities of the said firms should have been discharged, then out of such money to pay the defendants whatever balance or sum might be due to them on account of any such advances as aforesaid, and interest thereon ; and in striking such balance, the defendants should give credit for all such sums as, after having been received by the said A. Jennings, his executors, administrators, or assigns, should have been by him or them paid over to, or applied, or disposed of, according to the directions of the defendants, who should have credit given them for all money applied in discharge of any of the liabilities of the said firms, or any of them, whether the same had, or should thereafter have been, actually advanced by them, or applied, according to their direction, by the said A. Jennings, his executors, administrators, or assigns, out of the assets realized ; and the defendants should also have credit for interest upon all moneys advanced by them on account of such liabilities, such interest to be calculated at the current rate of interest declared by the Bank of England for the time being, provided the same be not less than 5*l.* per cent. ; but if the current rate of interest for the time being declared by the Bank of England should be less than 5*l.* per cent., then the defendants should have credit for interest at the rate of 5*l.* per cent. upon all moneys advanced by them as aforesaid ; and when and after such balance should have been paid, then the said A. Jennings, his executors, administrators, or assigns, should pay over the residue of the money received, or to be received, by him, by virtue of those presents, to and among the several plaintiffs, in such proportions as they might be found entitled to, upon taking an account among them, of the assets and liabilities of the several firms, and of the respective interests therein, or the respective

members thereof, and of the respective amounts contributed out of the separate property of any such member. And it was by the said deed provided, that in taking such account as last aforesaid, no one or more of the plaintiffs was to be liable to any other or others of them, by reason of his or their or of any firm having contributed less than his, their, or its proportions towards the general assets thereby assigned—it being intended that the assignment thereby made, and the keeping of the covenants therein contained, by the several plaintiffs, should exonerate them from all claims, in respect of the said firm, as well amongst each other as by the defendants. And it was also further provided, that at the expiration of one year from the date of these presents, unless all claims and demands of the defendants should first have been satisfied out of the assets of the said firms, or other money received under the said trusts, and all liabilities of the said firms, should have been discharged, and no further payments or advances by the defendants should be required in case the whole of the assets, property, and effects thereby assigned, or intended to be assigned, should not have been completely realized and converted into money, should forthwith be valued by the firm of Messrs. Coleman, Turquand & Young, of Tokenhouse-yard, in the city of London, accountants; or in the event of that firm refusing to make, or being in any way incapable of making, such valuation, then by such other accountant in the city of London as should be named in writing by the defendants for that purpose; and the said Messrs. Coleman, Turquand & Young, or such other accountant, should estimate, according to such valuation, and declare, whether or not there was any, and if any, what amount of deficiency or surplus of the money, assets, property, and effects thereby assigned, or intended to be assigned, below or above the amount of such advances, payments, and interests as aforesaid, together with any outstanding liabilities of the said firms, or any of them, or of the defendants on their account; or if it should, upon such valuation, be so estimated and declared, that there was any such deficiency, or that there was not any such surplus as aforesaid, then the said A. Jennings, his executors, administrators, and assigns, should, from the time of such declaration, hold in trust for the defendants, absolutely at their disposal, all the money, assets, property, and effects held by him, by virtue of those presents, and should assign and transfer the same to the defendants, or otherwise dispose thereof, in such manner as they should direct. And it was by the said deed further declared and agreed, that the said defendants should have power, if and so often as they should think fit, to extend the time for making such valuation, and any time subject to the expiration of the said year, which should be named in writing, and substituted by the defendants, as the time for such valuation, should, unless and until such time should be further extended, be taken to be the time for such valuation. And those presents should have the same effect as if such substituted time had been named therein, instead of the expiration of one year from the date of those presents. And it was, by the said deed, further declared and agreed by and between the said several parties thereto, that the said A. Jennings, or other the trustee for the time being of those presents, should have full power and authority as in the said deed set forth, to carry out the object of the said arrangement,

and, amongst other things, the plaintiff, and every one or more of them, did thereby irrevocably constitute and appoint the said A. Jennings, his executors, administrators, and assigns, the true and lawful attorney or attorneys of them, and every one or more of them, the plaintiffs, their and his executors, administrators, and assigns, in their or his names or name, or otherwise to ask, demand, sue for, recover, and receive, all debts and sums of money owing to them or him, on any account whatever, and all other the premises thereby intended to be assigned; and on payment or delivery thereof, or any part thereof respectively, to sign and give proper receipts, acquittances, and other discharges, for the same respectively; and on non-payment or non-delivery thereof respectively, to commence and prosecute any action, suit, or other proceeding for compelling payment and delivery thereof; and also to make and agree to any compromise or compositions respecting the same; and also endorse any bills of exchange, promissory notes, bills of lading, or other negotiable instruments or securities; and also to refer to arbitration any matter in dispute, and to defend or compromise any action, suits, or other proceeding, and compromise any claim which may be brought, taken, or made against the plaintiffs, or any one or more of them; also to adjust, liquidate, and finally discharge all actions, dealings, and transactions relating to the said trust estate and premises; and to execute all deeds, and do all acts whatsoever, which should be requisite, in order to give complete effect to the assignment thereby made, and the purposes of the trust; and one or more attorney or attorneys, under or in place of the said A. Jennings, his executors, administrators, or assigns, to appoint and substitute, and such appointment or substitution at pleasure to revoke, they, the plaintiffs, any one or more of them, thereby ratifying and confirming, and agreeing to ratify and confirm, whatever their or his said attorney or attorneys, or his or their substitutes, shall lawfully do in the premises. And it was thereby declared and agreed that a certain sum of 1000*l.*, thereby agreed to be paid by the said plaintiff C. P. Varsami to the said A. Jennings, should, when so paid, be held, subject to the trusts therein contained, and be deemed, for all the purposes, and for accounts with the defendants, and in the estimation of assets, and other property thereby assigned, as part of such assets and property; but, as between the several plaintiffs, the said 1000*l.* should be deemed to have been contributed by the said plaintiff C. P. Varsami out of his separate estate. And it was by the said deed also declared and agreed, that the said A. Jennings should be entitled to receive a fair remuneration for his services by commission, or otherwise, in such manner and to such amount as the defendants might appoint and determine. And the said plaintiff C. P. Varsami did, by the said deed, covenant and agree with the defendants, that he would, within seven days after the execution of those presents by him, the said C. P. Varsami, pay to the said A. Jennings, or the trustee for the time being, the sum of 1000*l.*, to be held and applied to the same uses and purposes as the assets and property thereby assigned or intended to be assigned. And further, in and by the said deed, the said plaintiff C. P. Varsami did, for himself, his heirs, executors, and administrators, further covenant with the defendants that the statement of accounts, in a schedule thereunder written, was substantially correct, so far as

the same relates to the said firm of C. P. Varsami. And the said plaintiff A. B. Manuel did thereby, for himself, his heirs, executors, and administrators, covenant with the defendants, that the statement of account in the said schedule was substantially correct, so far as it related to the said firm of Manuel & Co. And the said plaintiffs G. P. Lascaridi and J. Collingwood did thereby, for themselves, their heirs, executors, and administrators, jointly and severally covenant with the defendants, that the said statement of account in the said schedule was substantially correct, so far as the same related to the said firms of C. P. Varsami, and J. Collingwood & Co., and of Manuel & Co. And the said G. P. Lascaridi and R. J. Richards did thereby, for themselves, their heirs, executors, and administrators, jointly and severally covenant with the defendants, that the said statement of account in the said schedule was substantially correct, so far as it related to the firm of G. Lascaridi & Co., of Liverpool. And the said G. P. Lascaridi did thereby, for himself, his heirs, executors, and administrators, covenant with the defendants, that the said statement of account in the schedule thereunder written was correct, so far as the same related to the firm of G. Lascaridi & Co., of Manchester, and the firm of G. Lascaridi & Co., of Bucklersbury; and also, so far as regards the liability of the said G. P. Lascaridi, in reference to the said firm of the Greek and Oriental Steam Navigation Company. And all the several plaintiffs did thereby, severally, for themselves and their respective heirs, executors, and administrators, covenant and agree with the defendants, that until the said assets, effects, and premises should have been realized, and the businesses and affairs of the said firms wound up, they, the several plaintiffs, would devote such time and attention as might be necessary, and do their utmost in assisting and co-operating with the said trustee for the time being of these presents, in realizing the assets, effects, and premises thereby assigned, or intended to be assigned, and in liquidating and winding up the businesses of the said several firms; and would, for that purpose, take all such journeys, make and prepare all such accounts, and keep all such books, and attend at such places and at such times, and would do and perform all such acts and things as the said trustees or the defendants might require, without any charge or remuneration for the same, except only the travelling and hotel expenses which they might thereby incur. And each of the plaintiffs did, by the said deed, for himself, his heirs, executors, and administrators, further covenant and agree with the defendants, that he, when required so to do, should and would execute all proper further assurances to carry out and give effect to the said assignment, and also to execute deeds and assignments of the property to purchasers from the trustee. And the defendants did, by the said deed, for themselves, their executors and administrators, jointly and severally covenant and agree with the plaintiffs, that they would from time to time make advances of money, and furnish funds to the said trustee for the time being, to meet the engagements of the said several firms, in such manner as the defendants should think proper, so as to enable the said trustee for the time being of these presents to wind up the businesses of the said several firms; but such advances were not, together with the advances then already made, as above mentioned, to exceed the sum of 123,500*l*.

unless the defendants should think proper to make advances beyond that sum. And it was thereby declared and agreed, by and between the parties thereto, that the defendants were to trust to their rights under those presents, and the security thereby given, and to any other securities they might take or have taken, for repayment of advances made and to be made by them for the said several firms; and that they were not to make or have any claim in respect of such advances against any of the members of the said firms. And the said A. Jennings did, by the said deed, enter into covenants to give effect to the said arrangements; and, by the said deed, it was further mutually declared and agreed by and between the said several plaintiffs, that the several partnerships existing between and among them, and which composed the several firms of Manuel & Co., of Fen Court aforesaid; C. P. Varsami, of Glasgow; G. Lascaridi & Co., of Liverpool; and J. Collingwood & Co., of Gibraltar, were thereby and thenceforth dissolved. And in consideration of the assignment thereby made, and the right and interest of the several plaintiffs, under the trusts thereby created, in and to the surplus balance, if any, after paying the defendants, the plaintiffs thereby mutually released each other from all other claims in respect of the said partnerships; and, in the event of any claim being made, or attempted to be enforced, by any one or more of the plaintiffs, against any other or others of them, in respect of any of the said partnerships, these presents might be pleaded as, and given in evidence of, a full and complete release of all such claims; but that release was not to extend to the rights of the plaintiffs—to the surplus, if any, of the property and assets thereby assigned in trust as aforesaid. And the plaintiffs say, that afterwards all conditions precedent were performed, and all times elapsed, and all matters and things were done and happened, and existed, necessary to entitle the plaintiffs to have the said covenant on the part of the defendants, namely, that they would from time to time make advances of money, and furnish funds to the said trustees for the time being to meet the engagements of the said several firms for the purposes aforesaid, performed by the defendants; and to have moneys advanced and funds supplied to meet, among other engagements, certain of the said liabilities and engagements of the plaintiffs, to wit, certain liabilities and engagements of the said firm of Manuel & Co., amounting to a large sum of money, to wit, the sum of 1000*l.*, according to the true intent and meaning of the said deed, and in order to give proper effect to the said arrangement. Yet the defendants broke their said covenant in this respect—that they wholly and wrongfully, and contrary to the true intent and meaning of the said deed, absolutely refused to advance money, or to furnish any fund, in any manner whatsoever, to meet the said liabilities and engagements of the said firm of Manuel & Co., although by so doing the defendants would not have exceeded the said sum of 123,500*l.*, the aforesaid limit of the advances to be made by them: whereby the plaintiffs have sustained great damage by reason of the said arrangement not having been fully carried out, according to the true intent and meaning thereof; and by reason of the said liabilities and engagements of the said firm of Manuel & Co. not being liquidated, as they might and ought to have been if the defendants had performed their said covenant, and had not committed

the said breach thereof; and by reason of the said firm of Manuel & Co. being still liable in respect of the said arrangements, and the affairs of the said firm not being wound up; and the plaintiffs claim 1000*l*. Seventh plea, that it was and is essential to the defendants having their advances secured by such assignments as in the recital of the said deed mentioned, that the said John Collingwood should execute the said deed, or otherwise concur or join in such assignment as aforesaid; and that without the concurrence of the said John Collingwood the businesses of the said firms, in which he was such a partner as in the said deed and declaration mentioned, could not be wound up by such trustee, or in such manner as by the said deed was provided and intended. And the defendant entered into and executed the said deed on the faith and confidence that the same would be forthwith executed by the said John Collingwood as a party thereto; and the said John Collingwood, although the time for his executing the said deed has long elapsed, has not signed, sealed, or delivered, or in any way executed, the said deed, or made, or joined, or concurred, in the assignment therein contained, or any such assignment as in the recitals of the said deed mentioned, but has wholly refused so to do, and has refused in any way to be bound by the said deed, or anything done thereby or in pursuance thereof, or to consent thereto; and the interests of the said John Collingwood in the said several firms, in which he was a partner as aforesaid, and in the assets thereof, have not been assigned to the said trustee, or in any way, as a security for the defendants; and the said John Collingwood has always kept and retained from the said trustee and the defendants all the stock, goods, merchandise, money, book and other debts, bills of lading, bills of exchange, books of account, vouchers, and securities, and all other property, credits, assets, estate, and effects of the said firm of John Collingwood & Co.; and the said trustee and the defendants have been altogether excluded from the possession and control thereof, and of assets of the said firm, to wit, to the amount of 40,000*l*. Demurrer, and joinder therein.

Watkin Williams, in support of the demurrer to the seventh plea.—Here all parties have executed the deed in question, except John Collingwood; and the other side say, that because Collingwood has not executed there is an end of the deed, for they say it was necessary that he should execute. But it is too late to state that, for the arrangement on that footing has gone on for a very long time; they have taken the benefit that they intended to take from it; all the property is assigned to A. Jennings, and he has received it all. They nevertheless say, "We are not bound by it, because Collingwood has not joined in the deed. We say that the plea, to be a good plea, ought to have shown that they had abstained from taking the benefit of the deed." [WILLES, J.—Does not the recital make it a condition precedent to have the assignment?] It does not appear on this statement what was the amount of Collingwood's liability. [WILLIAMS, J.—There is no remedy against Collingwood unless he executes; it is impossible that the deed can be enforced unless he executes.] There is none that I am aware of.

THE COURT at once gave

Judgment for the defendant.

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1. In an action against baron for goods sold to the feme,—it is not competent to the Judge to amend the record at the trial by adding the feme as a defendant, and an allegation that the goods were sold to her *dum sola*.
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2. The 222d section of the Common Law Procedure Act, 1852, was not intended to apply to the joinder of parties, already provided for by ss. 35—39. *Id.*

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ANCIENT LIGHTS.

Obstruction of.

1. Where the owner of the dominant tenement has exceeded the limits of his admitted right to the access of light and air, either by enlarging or altering an ancient window or opening an additional one, and has thereby put himself into such a position that the excess cannot be obstructed by the owner of the servient tenement without at the same time obstructing the admitted right, no action can be maintained for the latter obstruction,—because it was unavoidably caused by the exercise of the right of the owner of the servient tenement to obstruct the excess.
Jones v. Tapping, 283
2. The plaintiff, being possessed of a house of three stories, with a window in each, lowered and enlarged the windows on the first and second floors, and added two new stories to the building, with windows therein. The altered windows on the first and second floors each occupied in part the space before occupied by the ancient windows: the window on the third floor remained as it had always been. The defendant, in rebuilding his premises opposite, obstructed the whole of the plaintiff's windows,—it being impossible (as found in a special case) to obstruct (899)

the new lights without at the same time obstructing the old ones. The plaintiff thereupon stopped up the new windows, and restored the old ones to their original state, and then required the defendant to remove the obstruction:—

Held, per tot. Cur.,—upon the authority of *Renshaw v. Bean*, 18 Q. B. 112 (E. C. L. R. vol. 83), and *Hutchinson v. Copestake*, 9 C. B. N. S. 863 (E. C. L. R. vol. 99),—that, inasmuch as the defendant could not obstruct the new lights, as he had a right to do, without at the same time obstructing the ancient lights, he was justified in the obstruction of all. *Jones v. Tipling*, 283

3. And Held by Byles, J., and Keating, J., that, the obstruction being lawful at the time of its erection, the defendant was not bound to remove it on the plaintiff's closing his new and usurped lights. *Id.*
4. Held, by Erie, C. J., and Williams, J., that the continuance of the obstruction after the cause for its erection had been withdrawn, was an unlawful act. *Id.*
5. Where the owner of the dominant tenement has exceeded the limits of the right which he has acquired to the access of light and air, by opening an additional window, leaving his ancient windows unaltered, he has not necessarily lost or suspended his admitted right: but the opening of the additional window justifies the owner of the servient tenement in obstructing the ancient windows if the doing so is unavoidable in the exercise of his right to obstruct the new window. *Binckes v. Pash*, 324
6. The plaintiff and defendant occupied houses adjoining each other as tenants under leases both of which were granted by the same lessor on the same day, viz. the 18th of December, 1788, and both expiring at the same time. The defendant by building on his own premises obstructed a window in the house of the plaintiff, though the latter had had an uninterrupted enjoyment of light and air for more than twenty years:—Held, that the circumstance of the two houses being held under the same landlord, and for the same term, did not prevent the one tenant from acquiring an indefeasible right to light as against the other. *Freeman v. Phillips*, 449

ARBITRAMENT.

Conduct of the reference.

It is highly improper,—though not per se a ground for setting aside his award,—for an arbitrator to employ the attorney of one of the parties to the reference (though his own attorney also), to assist him in framing the award. *In re Underwood and The Bedford and Cambridge Railway Company*, 442

ASSAULT.

Damages for,—See NEW TRIAL, 2.

BANKRUPT.

ATTORNEY.

Delivery of signed bill.

Set off.—An attorney may set off a claim for costs, notwithstanding no signed bill has been delivered. *Brown v. Tibbits*, 655

AUCTION.

Sale by,—See MARKET, 3.

BANKRUPT.

Trading.

1. A. held a lease of mines of coal and ironstone, and carried on the business of smelting, adding to the iron ore produced from his own mines from 65 to 70 per cent. of ore which he bought elsewhere and smelted the whole into pig-iron which he sold in the market:—Held, that he was a trader within the meaning of the Bankrupt Act, 12 & 13 Vict. c. 106. *Turner v. Hardcastle*, 683

Act of Bankruptcy.

2. A trader, being pressed by a particular creditor, who had issued an execution against him, under which the sheriff had seized, executed an assignment of all his estate and effects for the benefit of his creditors, and in the presence of the party to whom the assignment was made, gave it to his attorney, in order that it might be used, if circumstances should render it necessary, as an act of bankruptcy, and caused notice to be given to the execution-creditor and the sheriff that "he had that day committed an act of bankruptcy:—Held, that the deed operated as a valid act of bankruptcy. *Turner v. Hardcastle*, 683
3. *Notice.*—Held also, that the general form of notice was sufficient, without stating of what the act of bankruptcy consisted. *Id.*
4. Whether the validity of the assignment as an act of bankruptcy would have been defeated if it had been shown that the petitioning creditor was aware of the circumstances under which the deed was executed,—*quære?* *Id.*
5. An assignment by a trader of all his property and effects for a present advance of part of their value is not necessarily an act of bankruptcy. *Pennell v. Reynolds*, 703
6. It is for the jury to say whether under the circumstances the effect of the assignment is to defeat and delay creditors. *Id.*

Rights of Assignees.

7. *Jus tertii.*—A., a trader, purchased a plant and stock under an agreement to pay the purchase-money by instalments, a proper assignment to be executed when the whole of the instalments should have been duly paid, and the vendor having power, in case of default for fourteen days after notice in writing to pay the several instalments, to re-enter, and expel the purchaser, &c. *Id.*

fault having been made in payment of certain instalments, but the vendor not having availed himself of his power to resume possession in the manner provided by the agreement, and A., the vendee, having become bankrupt:—Held, that the assignees of A. were entitled to recover the whole value of the goods, in an action of trover against the wrongdoer. *Turner v. Hardecastle*, 683

BAILMENT.

See NEGLIGENCE.

BARON AND FEME.

See HUSBAND AND WIFE.

BASTARDY ORDER.

See HUSBAND AND WIFE, 5.

BELL RINGING.

To the annoyance of the inmates of a House.

The mere fact of a man being instructed to deliver papers at the house of a third person is no answer to a complaint against him under the 10 & 11 Vict. c. 89, s. 28, charging him with having "wilfully and wantonly" disturbed the party and his family by violently knocking and ringing at the door at an unreasonable hour of the night. *Clarke, app., Hoggins, resp.*, 645

BILLS OF EXCHANGE.

Cancellation of adhesive Stamp on foreign Bill.

1. It is the duty of the party who receives a foreign bill in England to see that the adhesive stamp is cancelled pursuant to the Stamp Act, 17 & 18 Vict. c. 83, s. 5, under pain of disability to make the instrument available for any purpose. *Pooley v. Brown*, 566
2. The plaintiff in April, 1860, purchased of the defendant, without recourse, a bill purporting to be drawn by A. in Brussels upon B. in London. Through the default of both parties, the adhesive stamp was not cancelled at the time of the transfer, pursuant to the 17 & 18 Vict. c. 83, s. 5. In April, 1861, B. became bankrupt, and proof of the bill against his estate was rejected in consequence of the neglect to cancel the stamp, and the name of A. turned out to have been forged. The plaintiff then called upon the defendant to return him the price he paid for the bill, as upon a failure of consideration:—
Held, by Erie, C. J., and Keating, J.,—Williams, J., dissenting,—that the non-observance of the requirements of the statute disabled the plaintiff from maintaining the action. *Id.*
3. And, held, by the whole Court, that, at all events, he was precluded by his own laches from recovering back the price he had paid for the bill. *Id.*

Form of declaring on.

4. The allegation in the declaration on a bill of exchange in the form given by the Common Law Procedure Act, 1852, that the bill is "now overdue," is not a traversable allegation, but part of the description of the instrument declared on. *Hinton v. Duff*, 724
5. Where, therefore, the action was commenced on the 11th of June, and the bill only arrived at maturity on that day:—Held, that the plaintiff failed to sustain his declaration, and that his right to recover was properly put in issue by "non acceptavit." *Id.*

BILLS OF LADING.

Rights and Liabilities of Endorsee of.

Under the Bills of Lading Act, 18 & 19 Vict. c. 111, the "rights and liabilities" of the consignee or endorsee under the bill of lading pass from him by endorsement over to a third party. *Smurthwaite v. Wilkins*, 842

BRICK-EARTH.

See ENCLOSURE.

BURNLEY IMPROVEMENT ACT.

Construction of.

By the 158th section of the Burnley Improvement Act, 1864 (17 Vict. c. lxxvii.), it is enacted, that, if any person shall build, erect, or place any building, erection, or thing within fifteen feet of the centre of the bed of the stream of the Brun, he shall be summoned before justices, who may order the removal of the obstruction, and impose a penalty on the offender. In 1857, a flood washed away the bed of the river, and, in 1859, the respondent, who had mills or works adjoining, and was owner of the land on both sides of the stream, restored the bed to its original level by laying large stones across, side by side, without any cement or other fastening:—

Held, that this was not a "building, erection, or thing," within the 158th section, and therefore that the justices were justified in declining to convict. *Colbran, app., Barnes, resp.*, 246

CERTIFICATE.

Under Common Law Procedure Act, 1860,—See COSTS, 6, 7.

CHARTER-PARTY.

Construction of,—See SHIPPING, 1.

CHATTEL.

See NEGLIGENCE, REVERSIONARY INTEREST.

CODICIL.

See WILL, 2, 3.

COMMON.

See ENCLOSURE.

COMMON LAW PROCEDURE ACT, 1852.

*Sections 35-39. Joinder of Parties,—See AMENDMENT, 2.**Section 49. Declaration on Bill of Exchange,—See BILLS OF EXCHANGE, 4.**Section 222. Amendment,—See AMENDMENT, 1.*

COMMON LAW PROCEDURE ACT, 1860.

Section 34. Certificate for Costs,—See COSTS, 6, 7.

CONTRACT.

Proof of.

1. The plaintiff declared upon an agreement by the defendant to transfer to him a farm which he (the defendant) held under Lord Sydney, "upon the terms and conditions of the agreement under which the same was held by the defendant under Lord Sydney :"—Held, that, in support of his claim to damages for a refusal on the defendant's part to perform the contract, it was not necessary for the plaintiff to produce the agreement under which the defendant held. *Wallis v. Littell*, 369

Construction of.

2. By an agreement between A. and B., it was stipulated that A. should for a certain term receive half the profits arising from the sales of an article called Russian Black manufactured by him from the produce of certain quarries of B. :—Held, that A. was not entitled to claim anything in respect of Russian Black not sold as such, but used by B., in the proportion of about one third, mixed with cement manufactured and sold by him. *Fullwood v. Akerman*, 737

Breach of.

3. Where two parties enter into a contract which is to be performed at a future day, and, before the day for performance arrives, one of them gives the other notice that he does not hold himself bound by it, the other is at liberty to treat such renunciation as a breach of the contract, without waiting the arrival of the day fixed for its performance. *The Danube and Black Sea Railway and Kustendjie Harbour Company (Limited) v. Xenoe*, 152
4. On the 9th of July, A., by his agent, agreed to receive certain goods of B. on board his ship to be carried to a foreign port,—the shipment to commence on the 1st of August. On the 21st of July, A. wrote to B. stating that he did not hold himself responsible for the contract, the agent having no authority

to make it; and on the 23d he wrote again offering a substituted contract, but still repudiating the original contract. B. by his attorneys gave A. notice that he should hold him bound by the original contract, and that if he persisted in refusing to perform it, he (B.) should forthwith proceed to make other arrangements for forwarding the goods to their destination, and look to him for any loss. On the 1st of August A. again wrote to B. stating that he was then prepared to receive the goods on board his ship, making no allusion to the original contract. B. had, however, in the mean time entered into a negotiation with one S. for the conveyance of the goods by another ship, which negotiation ended in a contract for that purpose with S. on the 2d of August. B. thereupon sued A. for refusing to receive the goods pursuant to his contract; and A. brought a cross-action against B. for refusing to ship.

Upon a special case stating these facts :—Held, that it was competent to A. to treat B.'s renunciation as a breach of the contract; and that the fact of such renunciation afforded a good answer to the cross-action of A., and sustained B.'s plea that before breach A. discharged him from the performance of the agreement. 14

CONVERSION.

Evidence of.

A. and B. verbally treated for the purchase of a horse by the former of the latter. A few days afterwards, B. wrote to A. saying that he had been informed that there was a misunderstanding as to the price, A. having imagined that he had purchased the horse for 30*l.*, B. that he had sold it for 30 guineas. A. thereupon wrote to B. proposing to split the difference, adding,—"If I hear no more about him, I shall consider the horse is mine at 30*l.* 15*s.*" To this no reply was sent. No money was paid, and the horse remained in B.'s possession. Six weeks afterwards, the defendant, an auctioneer who was employed by B. to sell his farming stock, and who had been directed by B. to reserve the horse in question, as it had already been sold, by mistake put it up with the rest and sold it. After the sale B. wrote to A. a letter which substantially amounted to an acknowledgment that the horse had been sold to him :—

Held, that A. could not maintain an action against the auctioneer for the conversion of the horse, he having no property in it at the time the defendant sold it,—B.'s subsequent letter not having (as between A. and a stranger) any relation back to A.'s proposal. *Paul Felthouse v. Bindley*, 629

COPIES.

See PRACTICE, 1.

COPYRIGHT.

See DRAMATIC COPYRIGHT.

COSTS.

Order under 15 & 16 Vict. c. 54, s. 4.

1. The discretion of the Court or a Judge as to allowing or withholding costs, under the 15 & 16 Vict. c. 54, s. 4, is to be exercised with reference to the propriety of bringing the action in the Superior Court at the time it is brought, and not with reference to the complications which may be introduced by the acuteness of the special pleader. *Howlett v. Tarte*, 634

Order for, under 19 & 20 Vict. c. 108, s. 19.

2. Under the 30th section of the County Courts Amendment Act, 19 & 20 Vict. c. 108, a plaintiff in an action of contract who obtains judgment by default for a sum not exceeding 20*l.*, is entitled to an order for costs under the same circumstances as would have entitled him to costs under the earlier County Courts Acts where he had recovered the like amount by a trial and verdict. *Baddeley v. Bernard*, 421
3. But the application should be made at Chambers. *Id.*

Certificate under 43 Eliz. c. 6, s. 2.

4. The 43 Eliz. c. 6, s. 2, is still in force in actions upon promises. *Danby v. Lamb*, 423
- Certificate under the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126, s. 34.*

5. The 34th section of the Common Law Procedure Act, 1860, which empowers a Judge to certify to deprive the plaintiff of costs where he recovers a verdict for less than 5*l.* in an action "for an alleged wrong," does not apply to *detinue*. *Douby v. Lamb*, 423
6. A certificate in the following words,—"I certify that the trespass or grievance in respect of which this action was brought was not wilful or malicious,"—is of no avail to deprive a plaintiff of costs under the 34th section of the Common Law Procedure Act, 1860. *Gooding v. Britmall*, 143
7. The Judge has no power to certify under the statute, where a right, though a small one, is really in issue. *Id.*

Costs to abide the Event.

8. In an action for the wrongful dismissal of a clerk, with a count for wages, the plaintiff obtained a verdict on the first count, and, no claim being urged on the second count, the verdict on that was entered for the defendants. A rule for a new trial was afterwards granted, "the plaintiff's costs of and occasioned by the trial already had, and of and occasioned by this application, to *abide the event of this cause*." On the second trial the defendants obtained a verdict on the first count, and the plaintiff (who had then discovered that there had been a mistake in

the calculation of the wages due to him at the time of his dismissal) had a verdict on the second count, for 4*l.* 19*s.* :—Held, that the event contemplated by the rule being the event in respect of which the contest took place upon the first trial, the plaintiff was not entitled to the costs mentioned in the rule. *Dawson v. Harris*, 801

COUNTY COURT.

See COSTS, 1, 2, 3.

CROWN GRANT.

Validity and Effect of.

1. A grant by the Crown to a subject, of the soil of the seashore below low-water mark, and of a toll for the anchorage of vessels there, may be presumed to have had a legal origin: and such a toll, if found to exist, may be enforced by distress. *The Free Fishers of Whitstable v. Gann, Gann v. Johnson*, 387
2. By deeds of lease and release of the 11th and 12th October, 1791, the manor of Whitstable, and the royalty of fishery or oyster-dredging within the said manor, were conveyed to A. and B.

By deeds of lease and release of the 24th and 25th of October, 1792,—reciting, amongst other things, that, within the said manor of Whitstable, there is, and for many hundred years then last past had been, a fishery for the growth and improvement of oysters, extending from the sea-beach for a very considerable distance into the sea, managed by a company of free dredgers called "The Whitstable Company of Dredgers,"—the manor (proper) was limited to A. and two others, in fee, and "the royalty of fishery or oyster-dredging, and the right of taking oysters and other fish within the said manor, and the ground and soil of the said fishery, and also the customary payments usually and of right made to the lord of the said manor for or on account of the anchorage of any ship or vessel, or the landing of any goods or merchandise within the said manor," &c., to C., in fee, on behalf of the Company.

By an Act of 38 G. 3, c. 42, the Whitstable Company of Dredgers were incorporated by the name of "The Company of Free Fishers and Dredgers of Whitstable;" and, in pursuance of that Act, the fishery, and all rights appertaining thereto, were by deeds of lease and release of the 4th and 5th of June, 1793, conveyed to the Company.

It appeared in evidence that the oyster fishery extended about two miles from the shore, and far below the ordinary low-water mark; and that the Company and those under whom they claimed had so far back as the year 1775 claimed a toll of 1*s.* for every vessel anchoring or grounding within

the space covered by their conveyance; and three instances were proved of the claim having been enforced by distress from vessels anchoring on the oyster-ground below low-water mark, when resisted,—there being no evidence to show that the claim had ever been resisted without recourse being had to a distress:—

Held, that, it being competent to the Crown to grant the soil of the seashore and the right to anchorage, the evidence was sufficient to justify the presumption of a grant having a legal origin; that the right of distress was incident to the right to the anchorage; and that the right to the anchorage was not destroyed by the severance of the marine from the terrestrial part of the manor. *The Free Fishers of Whitstable v. Gann, Gann v. Johnson*, 387

CROYDON IMPROVEMENT ACT.

Construction of,—See STATUTE.

DAMAGES.

Measure of.

1. It is no ground for a new trial, in an action for an assault and false imprisonment, that the plaintiff had incurred an expense of 7l. 14s. in procuring his discharge from custody, and the jury have awarded him a farthing only. *Bradlaugh v. Edwards*, 377

Remoteness.

2. The defendant caused the plaintiff to be apprehended upon an unfounded charge, and to be detained from $\frac{1}{2}$ past 1 until 2 o'clock. In support of a claim for special damage in an action for false imprisonment, the plaintiff proved that he would have been engaged as a journeyman by one J. S., if he had presented himself at the factory at 2 o'clock on the day in question; but that, being unwell from the treatment he had received, he went home, and did not go to the factory until the next morning, when he found that his intended employer had engaged another man:—Held, that this damage was too remote. *Huey v. Felton*, 142

DEVISE.

Construction of.

Estate in fee.—Testator by his will, made before 1838, gave all his real and personal estate to trustees, in trust, after payment of his debts, &c., to convert the personal estate into money, to be placed at interest. He then gave all “the profits” arising from his real estate and the interest of his personal estate to his wife, to be applied to her maintenance and support at the discretion of the trustees, if she should need the whole of it, during her life. He then gave a legacy of 800l. to his niece. He then willed that his trustees should put his kinsman G. S. into

ENCLOSURE.

possession of a close called ‘The First Close,’ which he gave to the said G. S.; and then followed this devise,—“*Then I give all that my close or piece of land called ‘The Second Close’ with all the appurtenances, unto my kinsman W. S., son of my late brother W. S.*”—Held, that a sufficiently clear intention to give W. S. an estate in fee was shown, to countervail the absence of words of limitation. *Smith v. Smith*, 121

And see WILL.

DISCLAIMER.

See LETTERS PATENT.

DISTRESS.

See CROWN GRANT.

DISTURBANCE.

See BELL RINGING.

DRAMATIC COPYRIGHT.

Infringement.

The author of a drama called “Gold,” which had been printed and represented on the stage, published a novel founded upon it, called “It is never too late to mend,” to which novel he transferred some of the scenes from the drama. The defendant caused another drama to be constructed from the novel, which he called “Never too late to mend,” taking many of the scenes from the novel which had been imported into the novel from the original drama, and produced it at his theatre:—Held, that this was an infringement of the plaintiff’s copyright in his drama. *Reade v. Conquest*, 479

ENCLOSURE.

Proceeding to ascertain Consents and Dissents.

The Court granted a prohibition against the Enclosure Commissioners, to prohibit them from proceeding with an enclosure under the 8 & 9 Vict. c. 118, where the Assistant Commissioner had, in taking the consents and dissents under s. 27, excluded from his estimate of the interest of the owner of the soil of the land to be enclosed, and over which rights of common existed or were claimed, the value of the brick earth thereunder, which would have more than sufficed to overtop the consents to the enclosure,—notwithstanding the provisional order contained the following so called exception,—“that all mines, minerals, stone and other substrata be reserved to C., with a right to enter the said lands when enclosed, for the purpose of opening, working, or winning such mines, minerals, stone, and other substrata, making compensation for any damage to the surface which may thereby be done.” *Church v. The Enclosure Commissioners*, 664

EQUITABLE SET-OFF.

See PLEADING, 2.

ESTOPPEL.

See MERGER, 2.

EVIDENCE.

Oral Evidence to Explain a Written Agreement.

1. The plaintiff declared upon an agreement by the defendant to transfer to him a farm which he (the defendant) held under Lord Sydney, "upon the terms and conditions of the agreement under which the same was held by the defendant under Lord Sydney." The defendant pleaded that the agreement declared on was made subject to the condition that it should be null and void if Lord Sidney should not within a reasonable time after the making of the agreement consent and agree to the transfer of the farm to the plaintiff:—Held, that it was competent to the defendant to prove by extraneous evidence this contemporaneous oral agreement, —such oral agreement operating as a suspension of the written agreement, and not in defeasance of it. *Waltis v. Littell*, 369
2. The plaintiff, who was known to be acting in the capacity of a "lace-buyer," was engaged by the defendant, a lace-dealer, under the following memorandum:—"M. agrees to engage P. for the term of three years from Monday the 15th of August, 1859, at the yearly salary of 500*l.*, payable monthly. P. to give the whole of his services, and to be advised and guided by M., if necessary." In an action by P. against M. for a wrongful dismissal pending the term, on the alleged ground of disobedience of lawful orders:—Held, that evidence was admissible to show the capacity in which the plaintiff was engaged, viz. as "lace-buyer;" and that it was properly left to the jury to say whether or not the orders which he was alleged to have disobeyed were such as a person in that position was bound to obey. *Price v. Mowat*, 508

Of non-access of Husband.—See HUSBAND AND WIFE, 5.

FAC-SIMILE COPIES.

See PRACTICE, 1.

FALSE IMPRISONMENT.

Damages for.—See NEW TRIAL, 2.

FISHERY.

See CROWN GRANT.

FOREIGN BILL.

See BILLS OF EXCHANGE, 1, 2, 3.

FREIGHT.

See INSURANCE, 3.
SHIPPING, 2.

GASWORKS CLAUSES ACT, 1847

Penalty for fouling Streams.—See STATUTE.

GAS COMPANIES.

Construction of Acts regulating.

1. The price to be charged for gas supplied to the Metropolis (as well as the quality) is regulated by the Metropolis Gas Act, 1860, 23 & 24 Vict. c. 125. *The Great Central Gas Consumers Company v. Clarke*, 814
2. Where, therefore, a gas company under their private Act were limited to a charge of 4*s.* per 1000 cubic feet for gas of such a quality as to produce from an argand burner of a given size a light equal in intensity to the light of twelve wax candles of six to the pound:—Held, that, on the coming into operation of the public Act, under which they were compelled to supply gas of a considerably better quality, the company were justified in increasing the charge to any sum within the maximum authorized to be charged by that Act. *Id.*

GRANT.

See CROWN GRANT.

HUSBAND AND WIFE.

Liability of Husband for the False Representation of the Wife.

1. In an action for the false and fraudulent representation of a married woman, that certain acceptances were the acceptances of her husband, whereby the plaintiffs were induced to discount them, and sustained loss through their turning out to be forgeries:—
Held, by Williams, J., and Willes, J., that the husband was properly joined as a defendant:

Held, by Erie, C. J., and Byles, J., that he was not,—the false representation being in substance a warranty of a debt, and so in the nature of a contract. *Wright v. Leonard*, 238

Joinder of Wife.

2. In an action against baron for goods sold to the feme,—it is not competent to the Judge to amend the record at the trial by adding the feme as a defendant, and an allegation that the goods were sold to her *dum sola*. *Garrard v. Guitbilet*, 616

Wife sued as a Feme Sola.

3. The Court set aside a judgment signed against a married woman (sued as a feme sole), but *without costs*, there being some doubt upon the affidavits whether she had not, when she contracted the debt with the

plaintiff, held herself out as being unmarried.
Wilson v. Hollings, 783

Acknowledgment of Deed by the Wife, under 3 & 4 W. 4, c. 74.

4. *Affidavit of Verification.*—The Court refused to allow a certificate of acknowledgment taken in Ontario, under the 3 & 4 W. 4, c. 74, to be filed, where the affidavit of verification purported to be sworn before "J. S., an attorney of the Supreme Court." The affidavit must be sworn before a magistrate, and his authority to administer oaths certified by a notary public. *Re Arabella Woodman*, 630

Presumption of Non-access.

5. Upon a complaint by a married woman who was living apart from her husband, charging a third party, under the 7 & 8 Vict. c. 101, with being the father of a bastard child of which she had been delivered, evidence having been given which justified the magistrates in presuming non-access of the husband,—Held, that it was no ground of objection to their decision that the magistrates allowed the wife to be asked a question tending to prove non-access of the husband,—the magistrates certifying that they found non-access independently of her evidence. *Kates, app., Chippendale, resp.*, 612

ILLEGITIMATE CHILD.

See HUSBAND AND WIFE, 5.

INDEMNITY.

See SURETY.

INSOLVENT.

Interim Order of Protection.

1. An interim order of protection under the 5 & 6 Vict. c. 118, and 7 & 8 Vict. c. 96, protects the insolvent from arrest on a ca. sa. upon a judgment against him for a debt contracted since the filing of his petition, although the final order does not. *Wallinger v. Gurney*, 182

Final Order, under 5 & 6 Vict. c. 118, and 7 & 8 Vict. c. 96.

2. The final order under the 7 & 8 Vict. c. 96, s. 22, constitutes an absolute bar to the actions in respect of which it is a protection,—though not in terms an order for distribution as well as for protection. *Markin v. Aldrich*, 599

3. And it is not the less a final order because it contains also an adoption of the proposal for payment of the debts made in the petition. *Id.*

Ecclesiastical Benefice.

4. The statutes 5 & 6 Vict. c. 116 and 7 & 8 Vict. c. 96, do not authorize the assignees to make the profits of a benefice, there being no provision therein equivalent to the 55th sec-

tion of the old Insolvent Act, 1 & 2 Vict. c. 110. *Markin v. Aldrich*, 599

INSPECTION OF DOCUMENTS.

See PRACTICE, 1.

INSURANCE.

On Goods to be declared as Interest might appear.

1. To entitle a person to sue upon a contract, it must be shown that he himself made it, or that it was made on his behalf by an agent authorized to act for him at the time, or whose act has been subsequently ratified and adopted by him: and the person for whom the agent professes to act must be capable of being ascertained at the time. *Watson v. Swann*, 756
2. S., an insurance broker at Hull, being instructed to effect an open policy for 5000*l.* for the plaintiff, against jettison only, "subject to declaration thereafter," and being unable to do so, declared certain deck cargo shipped for Ostend on board one of the plaintiff's vessels on the back of a general policy which he had previously effected for himself "upon any kind of goods and merchandise, as interest might appear," and got it initialed by the underwriters. A loss having happened,—Held, that it was not competent to the plaintiff to maintain an action against the underwriters upon this policy, the contract not having been made by him or on his behalf at the time. *Id.*

Total Loss.

3. *Of freight.*—Freight under a charter was insured, for a voyage from the Cape of Good Hope to Hondeklip Bay, an open roadstead 180 miles up the coast, there to load a cargo of copper ore, to proceed therewith to Swansea at a freight of 40*s.* per ton. Arrived at Hondeklip Bay, the master received on board part of the cargo (the whole being ready), when, a storm coming on, he was compelled to put to sea with the loss of an anchor and an injury to his windlass; and, after beating about the offing, he deemed it expedient to sail for St. Helena, a distance of about 1800 miles. Finding, on his arrival there, that he could not get an additional anchor or the requisite repair, the master discharged the portion of the outward cargo which he had not landed at Hondeklip Bay, and proceeded to Swansea with the homeward cargo, short by about 120 tons of a full cargo. The jury,—although the master did not run for the Cape, where it appeared that the necessary repairs might have been obtained,—found that the master acted throughout as a prudent owner uninsured would have done.—Held, that, under these circumstances, the underwriters were not responsible as for a total loss of the freight of the 120 tons by perils of the sea. *Phillips v. Swann*, 279

JUS TERTII.

See *BANKRUPT*, 7.

LACHES.

See *BILLS OF EXCHANGE*, 3.

LANDLORD AND TENANT.

Presumption of continuance of Tenancy.

1. Where a tenancy from year to year has been determined by a regular notice to quit, the mere accidental detention of the key by the tenant (who has quitted the premises and removed his goods) for two days beyond the expiration of the term, does not amount to any evidence of use and occupation, so as to render him liable for another quarter. *Gray v. Bompae*, 520

[Lease.]

2. The plaintiff, who had leased premises to B. for a term of years, which was unexpired at B.'s death, afterwards, in the belief that no one would administer to B.'s estate, agreed with B.'s son for him to occupy the premises as a yearly tenant, at the rent reserved by the lease to B. The son accordingly occupied and paid rent. The plaintiff repaired the premises shortly before Michaelmas, 1861, and having afterwards discovered that the defendant, a daughter of B., was the administratrix to his estate, and, as such, claimed to hold the premises for the remainder of the term under B.'s lease, the plaintiff sued her on the covenant in the lease to repair, and also brought ejectment for forfeiture for non-repair. In the action on the covenant the defendant paid a sum of money into Court, which the plaintiff accepted in satisfaction. There was no want of repair to the premises after the plaintiff had so repaired them, and the rent due up to Michaelmas, 1861, was paid by B.'s son, and received from him by the plaintiff before either action:—Held, in the action of ejectment, that either the rent paid by B.'s son was to be taken in satisfaction of the rent under the lease, and so there had been a waiver of the forfeiture, or else there had been an eviction of the defendant by the plaintiff which would prevent his taking advantage of a forfeiture for non-repair during such eviction.

Held also, per Erie, C. J., and Byles, J., that the statement in the plaintiff's declaration in the action on the covenant, that the breach for non-repair occurred during the existence of the term, was a further ground against the plaintiff recovering in ejectment. *Pollatt v. Boosey*, 885]

LETTERS.

Property is.

The receiver of a letter has a sufficient pro-

perty in the paper upon which it is written to entitle him to maintain detinue for it against the sender, into whose hands it had come as a bailee. *Oliver v. Oliver*, 139

LETTERS-PATENT.

Construction of Specification and Disclaimer.

An invention of "improvements in embossing and finishing woven fabrics and in the machinery or apparatus employed therein," as described in the specification, consisted in the use of rollers having "any design grooved, fluted, engraved, milled, or otherwise indented upon them." A disclaimer was afterwards entered, from the statements wherein it appeared that the effect desired could only be produced by the use of a certain species of roller not particularly described in the specification viz. a roller having circular grooves round its surface. All other rollers were expressly disclaimed:—Held, by the Exchequer Chamber, affirming the judgment of the Court below,—that such a disclaimer was in effect an attempt to turn a specification for an impracticable generality into a grant for a specific process which was comprised within the generality in one sense, but could not be discovered to be there without going through the same course of experiment which led to the discovery of the specific process in the disclaimer: and, consequently, that the disclaimer was void, as an attempt to extend the patent. *Ralston v. Smith*, 471

LIGHTS.

See *ANCIENT LIGHTS*.

LLANDAFF AND CANTON DISTRICT MARKETS ACT, 1858.

See *MARKET*.

MAIDENHEAD WATCH RATE.

See *WATCH RATE*.

MARKET.

Construction of the Llandaff and Canton District Markets Act, 1858, 21 & 22 Vict. c. cv. s. 25.

1. The 25th section of the "Llandaff and Canton District Markets Act, 1858," 21 & 22 Vict. c. cv., enacts that "every person who shall sell or expose for sale at any place within the limits of this Act (other than in any existing market-place, or the market-house and market-places to be established under this Act, or in his own dwelling-house, or in any shop attached to and being part of any dwelling-house), any article in respect of which tolls are by this Act authorized to be taken, other than eggs, butter, and fruit, shall forfeit 40s.:—Held, that a vessel moored

to a wharf on the old canal within the limits was not a "shop" within the exemption. *Wiltshire, app., Baker, resp.*, 237

2. The 25th section of the Llandaff and Canton District Markets Act, 1858 (21 & 22 Vict. cv.), enacts that every person who shall sell or expose for sale at any place within the limits of the Act (other than in his own dwelling-house, or in any shop attached to and being part of any dwelling-house), any article in respect of which tolls are by this Act authorized to be taken, shall incur a penalty of 40s.:—Held, that, to bring it within the exemption, the shop need not be attached to and part of the dwelling-house of the party himself. *Wiltshire, app., Willett, resp.*, 240

3. Held also, that a sale by auction in a "shop" attached to and being part of any dwelling-house is privileged. *Id.*

4. The 13th section of the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), enacts that "after the market place is open for public use, every person other than a licensed hawkers who shall sell or expose for sale in any place within the prescribed limits except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorized to be taken in the market," shall forfeit 40s.

The 38th section of the Wolverhampton Improvement Act, 1853 (16 & 17 Vict. c. xxviii.), enacts that "the local board and their lessees may from time to time demand and take from any person occupying or using any shop, stall, stand, bench, or ground space in any market-place for the time being under the management of the local board, and used as a general market, such tolls as the local board or their lessees from time to time to appoint, not exceeding the several tolls specified in the schedule A. to the Act annexed;" and the schedule in terms imposed the "toll" on the occupier of "every shop, stall, or ground space" in the market, and not upon the commodities sold or exposed for sale there:—

Held, that a person who sold fruit and fish (which are marketable articles) from door to door within the prescribed limits, did not thereby become liable to the penalty imposed by the 13th section of the general Act: *Cuswell, app., Cook, resp.*, 637

5. And that the "prescribed limits" meant the limits to which the local Act applied, viz. the boundaries of the borough. *Id.*

MASTER AND SERVANT.

Wrongful Dismissal.—See EVIDENCE, 2.

And see COSTS, 8.

MEASURE OF DAMAGES.

See DAMAGES, 1.

MEMORANDA.

Resignation of Hill, J. 120.

Appointment of Mellor, J. 120.

Death of Lord Campbell, 476.

Appointment of Sir Richard Bethell to be Chancellor, 476.

Sir William Atherton appointed Attorney General, 476.

Roundell Palmer, Esq., appointed Solicitor General, 476.

MERGER.

Of Term of Years in the Fee.

1. By a deed of settlement of the 7th of August, 1832, a farm was conveyed to A. for life (subject to a term of 1000 years), with power to lease for three lives, with a remainder over which ultimately became vested in B. and C. The term of 1000 years was created for the securing a sum of 3000*l.*, and was at the time of such settlement vested in two trustees, one of whom was A., the tenant for life. In exercise of the leasing power, A. granted a lease of the farm for three lives, under which lease the plaintiff (below) became tenant, subject to the rent thereby reserved, and which rent was paid by the plaintiff (below) to B. and C. (or to R. & D., their attorneys) upon their coming into possession of the property.

Subsequently, R. & D., as the attorneys for B. and C., wrote to the plaintiff (below) stating that the legal estate under the term for 1000 years was in J. S., and directing him to pay the rent to J. S.; and, in consequence of that communication, the plaintiff (below) allowed J. S. to recover judgment against him in an action for rent under the lease. B. and C. afterwards distrained for rent as due to them; whereupon the plaintiff (below) brought replevin, and a case was stated by the County Court Judge for the opinion of this Court:—

Held, that, as the term of 1000 years had (as to one moiety) merged in A. and B., and C. had therefore a right to distrain for a moiety of the rent, the effect of the representation by R. & D. would not estop B. and C. from recovering rent which the plaintiff (below) had not paid in consequence of such representation, or had not made himself liable to pay under the judgment obtained against him by J. S. *White, app., Greenial, resp.*, 249

2. Whether the representation by R. & D. was binding on B. and C. as an estoppel, they being married women and consequently incapable of appointing attorneys,—*quære? Id.*

METROPOLIS GAS ACT, 1860.

Construction of s. 56: Expenses of Soliciting the Act.

1. The 56th section of the Metropolis Gas Act,

1860 (23 & 24 Vict. c. 125), enacts that "the costs, charges, and expenses of an incident to the passing of this Act, and preliminary thereto, shall be paid by the Metropolitan Board of Works" out of certain funds:

Held, that the persons to whom such payment is to be made by the board, are, the promoters of the Act, and not the solicitor or parliamentary agent retained and employed by them for hire and reward to do the necessary work. *Wyatt v. The Metropolitan Board of Works*, 744

Regulation as to Price and Quality.

2. The price to be charged for gas supplied to the Metropolis (as well as the quality) is regulated by the Metropolis Gas Act, 1860, 23 & 24 Vict. c. 125. *The Great Central Gas Consumers Company v. Clarke*, 814

3. Where, therefore, a gas company under their private Act were limited to a charge of 4s. per 1000 cubic feet for gas of such a quality as to produce from an argand burner of a given size a light equal in intensity to the light of twelve wax candles of six to the pound:—Held, that, on the coming into operation of the public Act, under which they were compelled to supply gas of a considerably better quality, the company were justified in increasing the charge to any sum within the maximum authorised to be charged by that Act. *Id.*

METROPOLIS LOCAL MANAGEMENT ACT.

See NEGLIGENCE, 6, 7.

METROPOLITAN BOARD OF WORKS.

See METROPOLIS GAS ACT, 1860, 1.

MINERALS.

See ENCLOSURE.

MUNICIPAL CORPORATION ACT.

See WATCH-RATE.

NEGLIGENCE.

In Conveyance of dangerous Articles.

1. One who employs a carrier to carry an article of such a dangerous nature as to require extraordinary care in its conveyance, must communicate the fact to the carrier, or he will be responsible for any injury which may result to the carrier or his servants from his omission to do so. *Farrant v. Barnes*, 553
2. The defendant being desirous of sending a carboy of nitric acid to Croydon, his foreman gave it to one R., the servant of a railway carrier, who (as the railway company would only carry articles of that dangerous character on one day in each week) handed it to the plaintiff, the servant of a Croydon carrier, without communicating to

him (and there being nothing in its appearance to indicate) its dangerous nature. Whilst being carried by the plaintiff to the cart, the carboy from some unexplained cause burst, and its contents flowed over and severely injured the plaintiff:—Held, that the defendant was liable for the injury thus resulting from his breach of duty. *Farrant v. Barnes*, 553

Riding an unruly Horse in a Public Thoroughfare.

3. The defendant bought a horse at Tattersal's, and the next day took him out to "try" him in Finsbury Circus, a much-frequented thoroughfare. From some unexplained cause, the horse became restive, and, notwithstanding the defendant's well-directed efforts to control him, ran upon the pavement and killed a man:—Held, that these facts disclosed no evidence of negligence which the Judge was warranted in submitting to the jury. *Hammack v. White*, 588

And see RAILWAY COMPANY, 1.

Injury through the Carelessness of a Fellow Workman.

4. A master is not responsible for an injury occasioned to a servant by tackle defective through the neglect of a fellow-servant, if there be no negligence or want of care on the part of the master, either as respects the providing the proper machinery, or the competency of the servant. *Searle v. Lindsey*, 429
5. The plaintiff was engaged as third engineer on board a steam-vessel of which the defendants were the owners, and, whilst employed with others under the orders of the chief engineer in turning a winch, one of the handles came off in consequence of the machine being through the neglect of the chief engineer in a defective and unsafe condition, and the plaintiff was seriously injured,—Held, that the owners were not liable. *Id.*

In Performance of Public Works.

6. Persons intrusted with the performance of a public duty, discharging it gratuitously, and being personally guilty of no negligence or default, are not responsible for an injury sustained by an individual through the negligence of workmen employed under them. *Holliday v. St. Leonard, Shoreditch*, 192
7. The vestry of L., in whom were by the Metropolis Local Management Act (18 & 19 Vict. c. 120) vested the powers and duties of surveyors of highways, under the powers conferred upon them by that Act appointed a surveyor at a salary. Workmen employed by the surveyor, and paid out of the parish funds, being directed to carry certain paving-stones from a public street under repair, and place them in another public street, so negli-

gently performed that duty that the plaintiff in driving through the last-mentioned street was upset and injured:—Held, that the vestry were not responsible. *Holliday v. St. Leonard, Shoreditch*, 192

Injury to a Chattel out on Hire.

8. The owner of a chattel, *e. g.*, a barge, which is out on hire for an unexpired term, may maintain an action against a third person for a permanent injury thereto. *Meare v. The London and South Western Railway Company*, 850

NEW TRIAL.

Alleged Miscarriage of Judge.

1. It is no ground for a new trial, that, the plaintiff having been asked while under cross-examination whether he was the author of a certain pamphlet which contained expressions of opinion on religious subjects altogether at variance with those generally received amongst Christians, and having declined to answer on the ground that his answer in the affirmative might subject him to a criminal prosecution, the counsel for the defendant was permitted for a considerable time (obviously with a view to prejudice the plaintiff with the jury), to read various passages of a similar tendency from other printed documents, each time repeating the inquiry whether the plaintiff was the author or whether the passage read expressed his notions on the subject,—the jury being entitled to have before them all the facts and circumstances from which they might be enabled to judge of the degree of credit due to the party as a witness. *Bradlaugh v. Edwards*, 377
2. Nor is it a ground for a new trial, in an action for an assault and false imprisonment, that the plaintiff had incurred an expense of 7*l.* 14*s.* in procuring his discharge from custody, and the jury have awarded him a farthing only. *Id.*

NITRIC ACID.

See NEGLIGENCE, 1, 2.

NOTICE.

Of Act of Bankruptcy.—*See BANKRUPT, 3.*

OBLITERATIONS.

See WILL, 4.

OBSTRUCTION.

Of Lights.—*See ANCIENT LIGHTS.*

OFFICE.

Contract for Sale of.

To a declaration for the price of certain volunteers' uniforms, the defendant pleaded

that the contract was corruptly entered into (in violation of the 49 G. 3, c. 126), with intent that the defendant might have a certain military commission:—Held, that the plea disclosed no illegality within the statute. *Eicke v. Jones*, 631

OYSTER-FISHERY.

See CROWN GRANT.

PARTNERSHIP.

Deed of Partnership.

By deed, dated the 2d March, 1861, between G. P. L., A. B. M., C. P. V., J. C., and R. J. R. (the plaintiffs in this action), of the first part; S. G., H. E. G., D. W. C., A. G. C., and R. B. (the defendants), of the second part; and one A. J. of the third part, it was recited that the plaintiffs G. P. L. and J. C. had for some time past carried on business in partnership as commission merchants at Fen Court, Fenchurch Street, in the city of London, under the style or firm of M. & Co., and at Glasgow, under the style or firm of G. P. V., and at Gibraltar, under the style or firm of J. C. & Co.; and that the said plaintiff G. P. L. had also for some time past carried on business as a commission merchant at Bucklersbury, in the City of London, and also at Manchester, under the style or firm of G. L. & Co.; and that the said plaintiffs G. P. L. and R. J. R. had for some time past carried on business in partnership at Liverpool, under the style or firm of G. L. & Co.; and that the said G. P. L. had also carried on business in partnership with one S. X. and one A. X., in Fenchurch Street aforesaid, under the style or firm of "The Greek and Oriental Steam Navigation Company." The plaintiffs, having determined to dissolve the said several partnerships, and to wind up and close the business of all the said firms, and in order to provide the necessary means, applied to the defendants for advances for this purpose, and furnished the defendants with a statement of account that the whole of the said debts and liabilities did not exceed the sum of 123,580*l.*; and the credits and assets of the said several firms were estimated to exceed 87,000*l.*; that the defendants consented to give such assistance and to make the necessary advances, upon having the same secured by an assignment to a trustee of all the assets, &c., of the several firms aforesaid, and all other property of the plaintiffs, or any of them, save and except as thereafter mentioned; and that the defendants had named the said A. J. to be such trustee, and that the defendants had made certain advances for the purposes aforesaid. Averment, that by the said deed they (the plaintiffs), and every one of them, according to their respective interests, assigned to the said A. J., &c., his

executors, &c., all the stock in trade, goods, merchandise, money, book or other debts, bills of lading, and securities of whatever nature, and all other property, real and personal, not only at London, but in all other places wheresoever, and of whatever nature the same might be, of the plaintiffs, or of any one or more of them, in which they, or any one or more of them, might be interested, save and except the leasehold, furniture, plate, &c., and all other the property and effects of the plaintiffs in and upon their respective dwelling-houses or places of residence, and save and except all other the separate estate and effects of the said plaintiffs A. B. M., C. P. V., J. C., and R. J. R., belonging to each of them respectively; and also save and except all right, title, and interest in the premises situated in Bothwell Street, Glasgow, wherein the business of the said firm of C. P. V. had been recently carried on, to have and hold the same, except as above excepted, to the use of the said A. J., his executors, &c., absolutely, but in trust, nevertheless, to sell, or otherwise collect and realize and convert into money, all the premises thereby assigned, and from and out of the proceeds thereof, and also out of a sum of 1000*l.* hereinafter mentioned, and all such money as should be received as part of the assets of any of the said firms, &c., to pay the expenses of preparing the said deed, and all other deeds or instruments, &c., and all expenses incurred in and about the execution of the said trust, it being intended that the assignment thereby made, and the keeping of the covenants therein contained by the several plaintiffs, should exonerate them from all claims in respect of the said firm, as well amongst each other as by the defendants. And it was also in and by the said deed further provided, that at the expiration of one year from the date of the said presents, unless all claims of the defendants should first have been satisfied out of the assets of the said firms, or other money received under the said trust, and all liabilities of the said firms should have been discharged, then, in case any part of the assets should not have been completely realized, it should forthwith be valued by a firm of accountants, who should state the amount of deficiency or surplus, as the case might be, &c., and the surplus over and above the claims should be held in trust by the said A. J. for the defendants, and at their disposal. Then a power was given to the defendants to extend the time for such valuation. Then the deed declared that a sum of 1000*l.*, therein agreed to be paid by the said plaintiff C. P. V. to the said A. J., should, when so paid, be held subject to the trust therein contained. The defendants, by the said deed, covenanted, jointly and severally, that they would make advances, &c., as

aforesaid, so as to enable the said trustee to wind up the business of the said several firms; but such advances were not, together with the advances then already made, to exceed the sum of 123,500*l.*, unless the defendants should think proper. In an action by the plaintiffs against the defendants for a breach of covenant in not making advances, &c., to which they pleaded, that after the execution by the others, J. C. had refused, and still refused, to execute the deed—Held, a good answer to the action, for that the deed was inoperative unless executed by each of the parties to it. *Lascardi v. Gurney*, 890]

PATENT.

See LETTERS PATENT.

PAWN.

Right of Pawnee to sell the Pledge.

1. The plaintiff, being indebted to one B. in the sum of 40*l.*, entered into a written agreement with him, whereby he agreed that B. should have his horse, van, cart, and two sets of harness, "for what he owed him;" and by the memorandum it was further agreed that B. should keep the articles mentioned until the plaintiff paid him the 40*l.*: and the memorandum concluded thus,—
"The said B. has received into his possession the said horse, van, cart, and two sets of harness this 24th December, 1860." B. received into his actual possession the horse and van and one set of harness, but, having no place to put them in, he left the cart and the other set of harness with the plaintiff, with an understanding that he was to take them whenever he pleased. B. having become insolvent, the plaintiff got back 'the horse, van, and set of harness: but B.'s assignee seized the whole of the things mentioned in the memorandum, and caused them to be sold by the defendant, an auctioneer:—Held,—that being the only question raised at the trial,—that there had been a sufficient delivery of the goods to B. to vest the property in him, subject to the right of the pawnor to redeem; and that, consequently, the plaintiff was not entitled to recover. *Martin v. Reid*, 730
2. *Quære*, as to the right of a pawnee to sell the pledge, where no day has been fixed for the payment of the sum for which the chattel is impignorated? *Id.*

PHOTOGRAPHS.

See PRACTICE, 1.

PLEADING.

What put in Issue under "Not Guilty."

1. *Quære*, as to what is put in issue under "not guilty" in an action against the sheriff for

the wrongful discharge of a defendant arrested on a ca. sa.? *Wallinger v. Gurney*, 182

Equitable Plea of Set-off.

2. A. and B., merchants in Australia, mutually agreed that each should buy gold dust, each to have half the profit or to bear half the loss on the resale of the gold dust to be bought by the other. In pursuance of this agreement, A. bought 365 oz. and B. 728 oz. It was then agreed that each of them should consign his parcel to C. in London, for sale on the joint account, with instructions to C. to give A. and B. each credit in account for a moiety of the proceeds of each consignment. In pursuance of this last-mentioned agreement, the gold dust so bought was consigned to C., B.'s 728 oz. being invoiced as consigned on the "joint account," and accompanied by a letter from B. (dated Feb. 2, 1852), instructing C. to place the net proceeds to the respective accounts of A. and B. in equal moieties. A. likewise consigned his 365 oz. to C., but omitted to send C. instructions to place a moiety of the net proceeds to the account of B. On the 15th of June, 1852, C. sent a letter to A. informing him that he would pass to his credit half the proceeds of the said gold dust, and thereby assented to obey the instructions he had received from B. On the 4th of February, 1852, B. wrote to C. as follows,—"I have no doubt A. has written that half the profits [net proceeds] of the 365 oz. of gold dust shipped to you is to go the credit of B., in the same way as half the profit of the 728 oz. is to go to his credit. If, however, he should not have done so, you will not pass the half profit of the 728 oz. to his credit." This letter of course was not received by C. at the time he wrote his letter of the 15th of June. B. became bankrupt, and C., having sold both parcels of the gold dust, gave B. credit for the whole of the proceeds of the 728 oz. and for a moiety of the proceeds of the 365 oz.:—Held, that a plea setting out these facts was a good plea of equitable set-off in an action for money lent, brought by C. against A. *Elkin v. Baker*, 526

Set-off at Law.

3. An attorney may set off a claim for costs, notwithstanding no signed bill has been delivered. *Brown v. Tibbits*, 855
4. To a count on an agreement to indemnify the plaintiff against all costs which the plaintiff might be obliged to pay as defendant in a certain suit, or in consequence thereof, alleging that the plaintiff, as defendant in that suit, was compelled to pay in the said suit and in consequence thereof a certain sum as and for costs,—the defendant pleaded, "as to so much of the count as relates to the plaintiff's claim in respect of

the payment by him of the said sum of money as and for costs in the said suit," a set-off:—Held, a good plea. *Brown v. Tibbits*, 855

PLEDGE.

See PAWNS.

PRACTICE

Inspection and Copies.

1. In an action for an alleged libel, the Court allowed the defendant to inspect and take fac-simile copies, "by photograph or otherwise," of the documents referred to in the declaration. *Davey v. Pemberton*, 623

Trial by Proviso.

2. A plaintiff is entitled to the same time for proceeding to trial after a rule made absolute for a new trial, as he had for proceeding to trial originally. *Oakeley v. Ooddeen*, 805
3. Consequently, where a rule had been made absolute for a new trial, and the plaintiff had gone down to try at the sittings after Michaelmas Term, but the jury, being unable to agree, were discharged from giving a verdict,—Held, that it was not competent to the defendant to take down the record for trial by proviso at the sittings after Hilary Term; the plaintiff not being in default. *Id.*

Setting aside Proceedings.

4. The Court set aside a judgment signed against a married woman (sued as a feme sole), but without costs, there being some doubt upon the affidavits whether she had not, when she contracted the debt with the plaintiff, held herself out as unmarried. *Wilson v. Hollings*, 783

PREScribed LIMITS.

See MARKET, 5.

PROHIBITION.

See ENCLOSURE.

PROMOTIONS.

See MEMORANDA.

PROVISO.

Trial by,—See PRACTICE, 2, 3.

PUBLIC COMPANY.

Definition of a Shareholder.

1. The time within which by the 9th section of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), a register of shareholders is to be made and sealed, is merely directory; and a register containing the several particulars required by the Act, and bonâ fide intended to be a register, may be

valid, though sealed at a subsequent period.
The Wolverhampton New Waterworks Company v. Hawksford, 456

2. Therefore a party may be liable as a shareholder for calls, under s. 27, although the register may not have been made and sealed within the time prescribed by s. 9. *Id.*

RAILWAY COMPANY

Evidence of Negligence.

1. Mere proof of an accident having happened to a train does not cast upon the railway company the burthen of showing the real cause of the injury. *Hammack v. White*, 594

Motion for Injunction under Railway Traffic Act, 1854.

2. A railway Company permitted a carrier (who also acted as superintendent of their goods traffic) to hold himself out as their agent for the receipt of goods to be carried on their line, and his office as the receiving office of the Company; and goods were received by him at that place without requiring the senders to sign conditions which the Company required all other carriers who brought goods to their stations to sign:—Held, an undue preference, and the subject of an injunction under the 17 & 18 Vict. c. 31. *In re Bazendale and the Bristol and Exeter Railway Company*, 787

REGULA GENERALIS.

As to special Cases, special Verdicts, and Bills of Exceptions.

"It is ordered, that, from and after the first day of Easter Term next, inclusive, every special case, special verdict, and bill of exceptions, set down in any of the superior Courts of common law, shall be divided into paragraphs, which, as nearly as may be, shall [each] be confined to a distinct portion of the subject: and every paragraph shall be numbered consecutively: and that the masters, on taxation, do not allow the costs of drawing and copying any special case, special verdict, or bill of exceptions not in substance in compliance with this rule, without the special order of the Court." *Reg. Gen.*

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REGISTRATION OF VOTERS.

Vide post, p. 919.

REMOTENESS.

See DAMAGES, 2.

RENUNCIATION.

See CONTRACT, 3, 4.

REVERSIONARY INTEREST.

In a Chattel.

The owner of a chattel, *e. g.*, a barge, which is

out on hire for an unexpired term, may sue a third person for a permanent injury thereto. *Mears v. The London and South Western Railway Company*, 850

SALE.

See CONVERSION.

SEASHORE.

Grant of,—*see CROWN GRANT.*

SET-OFF.

See PLEADING, 2.

SETTING ASIDE PROCEEDINGS.

See HUSBAND AND WIFE, 3.

SHAREHOLDER.

See PUBLIC COMPANY.

SHIPPING.

Construction of Charter-party.

1. By the terms of a charter-party, the plaintiff's ship (a steam-vessel) was to proceed to H., to be there ready to load by a given day, or so near thereunto as she might safely get, and there load from the factors of the merchant such quantity of oxen, sheep, and [or] other lawful produce which the merchant might find it convenient to ship, not exceeding what she could reasonably stow and carry over and above her tackle, &c., and, being so loaded, was to proceed therewith to London, and deliver the same on being paid freight a lump sum of 450*l.* Two working days were allowed for loading and discharging, and three days on demurrage. The cargo to be taken to and from alongside at the merchant's risk and expense.

Arrived at H., the vessel went alongside the jetty, and received on board a number of barrels of hams and 300 head of live-stock, for which the captain signed bills of lading. Being thus laden, the vessel was found to draw too much water to get over the bar, and the captain was consequently obliged to take out all the stock. He then proposed to the charterer's agent to stow on board so many of the cattle as would enable him to pass over the bar, and to remain outside and there take in the remainder at the charterer's expense and risk. The agent declined to accede to this, and refused to put any of the cattle again on board, unless the captain would take all. Being unable to come to terms, the captain proceeded on his voyage with only the hams on board:—

Held, that, under these circumstances, the owners were not entitled either to the stipulated freight or to damages for the refusal to ship the cargo; for, that, although the captain was not obliged to go within the bar

at all, yet, having chosen to do so, and having received the cargo on board, and signed bills of lading, he was bound to find his way to his destination. *The General Steam Navigation Company v. Slipper*, 493

Freight.

2. Goods were put on board a ship consigned for Calcutta, at 39s. per ton, "payable in London:"—Held, that it was for the jury to say from the surrounding circumstances whether the contract was a contract for "freight" contingent on the ship's arrival at her destination, or for a sum payable on the receipt of the goods on board her. *Lidgett v. Perrin*, 362

And see **BILLS OF LADING.**

[Part Owners.

3. A. and B. were joint owners of a ship; A. working the ship, defraying all the expenses, and taking the uncontrolled management of her, and paying himself by taking two thirds of the gross earnings; B. taking the remaining one third as his portion:—Held, that the result of these facts was, that A. was a hirer of the share of B., and not the servant or agent of B., so as to render B. liable in an action of tort for damages caused by the negligence of A. *Bernard v. Aaron and Sharpley*, 889]

SHOP.

See **MARKET**, 1.

SPECIFICATION.

See **LETTERS PATENT.**

STAMP.

See **BILLS OF EXCHANGE**, 1, 2.

STATUTE.

Constructive Repeal of a former inconsistent Statute.

By the Croydon Improvement Act, 10 G. 4, c. lxxiii., a penalty of 200l. is imposed upon any gas or other company for suffering any impure matter to flow into any stream, &c., to be sued for by any common informer. By the 21st section of the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), a like penalty is imposed for the same offence,—such penalty (by s. 22) "to be recovered by the person into whose water such substance shall be conveyed, or whose water shall be fouled by any such act:"—

Held, that, the latter provision was pro tanto a repeal of the former. *Parry v. The Croydon Commercial Gas and Coke Company*, 579

Construction of,—see *Gas Companies*.

SURETY.

Discharge of, by Time given to the Principal.
A., at the request of B., and on his promise

that he would share any loss or liability he might thereby incur, accepted a bill at three months for the accommodation of C. At the maturity of the bill, C. being unable to meet it, it was agreed between the holders and A. and C. (without the knowledge of B.) that another bill should be drawn for the amount, in substitution of the former acceptance. A. having been obliged to pay the second bill, sued B. on his indemnity:—Held, that B's liability on his undertaking was not discharged by the renewal of the bill,—the parties not standing in the position of creditor and principal and surety. *Way v. Hears*, 774

[TITHES.

Modus.

By a private Act of Parliament, passed in 1762, for carrying into effect an agreement between the landowner and rector for the commutation of tithes on certain lands in the parish of W., in was declared that certain rents therein specified should be vested in the rector, in lieu of and as full compensation for all tithes of corn, grain, hay, wool, lamb, and all other tithes whatsoever, except as after mentioned, arising from all or any of the lands in the said parish, save and except marriage, churching, and burial fees, "provided that nothing in the Act should prejudice the right of the said rector, or his successors, to any marriage, churching, or burial fees, nor the right of tithes and customary stocking" in certain specified lands, "the modus in the Groves and Ancient Closes adjoining to the town, and all other petty and personal tithes not herein mentioned and relinquished, all which the said rector reserves, and they are hereby reserved to him and his successors in full right and in as ample manner as they have always been enjoyed." The Assistant Tithe Commissioner having decided that the said lands, called "the Ancient Closes," were not exempt from tithes,—Held, on motion for a prohibition, that the tithes of "the Ancient Closes" were not commuted or extinguished by the private Act of 1762, and therefore the jurisdiction of the Commissioners was not taken away by section 90 of the Tithe Commutation Act, 6 & 7 W. 4, c. 71.

Semble—that, even if the tithes of wool and lamb were not included in the modus reserved to the rector, and were, therefore, extinguished by the Act of 1762, such partial extinguishment of tithes arising out of the lands would not satisfy section 90, so as to deprive the Commissioners of jurisdiction. *Re Wintringham Tithes*, 879]

TRADING.

See **BANKRUPT**, 1.

TROVER.

See CONVERSION.

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See NEGLIGENCE, 6, 7.

WATCH RATE.

In boroughs, under 2 & 3 Vict. c. 28, and 3 & 4 Vict. c. 28.

By the 92d section of the Municipal Corporation Act, 5 & 6 W. 4, c. 76, the council of the borough were authorized to impose a watch-rate on all property in the borough, situate within 200 yards of any street or continuous line of houses. By the 2 & 3 Vict. c. 28, s. 1, the council are authorized, if they think fit, to cause the *whole* of the borough to be watched, and to order that the whole borough shall be assessed to a watch-rate. Such an order having been made by the council of the borough of M.:—Held, that all property within the said borough, though situate more than 200 yards from any street or continuous line of houses, was liable to be rated; and that there was nothing in the subsequent Act of 3 & 4 Vict. c. 28, to limit that liability. *The Great Western Railway Co., app., Maidenhead (Town Council), resp.*, 553

WHITSTABLE FISHERY.

See CROWN GRANT.

WILFUL ANNOYANCE.

See BELL-RINGING.

WILL.

Proof of.

1. In order that an unattested paper may be adopted as part of a duly attested will, it must be referred to by the will in such a manner as shall, with the assistance of parol evidence when necessary and properly admissible, leave no doubt of its identity. *Dickenson v. Stidolph*, 341
2. Where a codicil refers to two memorandums, and only one is found, effect must be given to that which *is* found,—for, either the ordinary presumption must prevail, that the missing paper was destroyed by the testatrix *animo revocandi*, or the principle must be applied that the apparent testamentary intentions of a testator are not to be disappointed, merely because he made other dispositions of his property which are unknown by reason of the testamentary paper which contained them not being forthcoming. *Id.*

Republication.

- 3- Operation of a duly attested codicil, though it relate only to personal estate, as a republication of the will, so as to pass lands purchased between the dates of the will and codicil. *Id.*
4. Effect of alteration, and obliterations made by the testator. *Id.*

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The notice (under s. 62 of the 6 & 7 Vict. c. 18) of the appellant's intention to prosecute the appeal must, *if possible*, be served ten clear days before the *first* of the days appointed for hearing appeals,—the proviso in s. 64 enabling the Court to postpone the hearing only applying where by reason of the lateness of the period at which the decision of the revising barrister took place there has not been reasonable time between that and the day of hearing for giving the notice. *Luckett, app., Gilder, resp., 1, 5; Luckett, app., Voller, resp., 1, 5; Luckett, app., Gollop, resp., 1, 5*

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The respondent will not be allowed costs on a registration appeal, where the case is a reasonably fit one for argument. *Collier, app. King, resp., 455*

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NOTICE OF OBJECTION.

Description of the Objector.

1. *Place of abode.*—An objector is bound in his notice to describe himself as of his true place of abode; and, if he has at the time of the signing the notice *bonâ fide* two places of abode, he may state either. *Curtis, app., Blight, resp.,* 95
2. For two years prior to February, 1861, A. resided in the house of his mother at 25 C. Street, it having been verbally agreed between them that he should occupy the house as tenant at will, paying no rent, and that she should live with him. Much of the furniture in the house belonged to A. In February, 1861, A. removed with his wife to 94 F. Street, where he continued down to the time of the revision to carry on the business of a licensed victualler; and it was necessary for the conduct of the business that he and his wife should live and sleep at 94 F. Street, and they did in fact live and sleep there from February, 1861, downwards without any interruption, save that they slept at C. Street one night, and that C. himself slept there ten nights; but they were both living and sleeping at 94 F. Street on the 23d of August when A. signed a notice of objection. A. had done nothing to prevent him from returning to live in C. Street, and he intended to return to live there whenever it should suit his convenience:—Held, that the revising barrister was warranted in finding that in point of *fact* C. Street was not the true place of abode of A., and that the notice of objection was consequently insufficient. *Id.*
3. A notice of objection is not vitiated by the address of the objector being added by a third person by his direction. *Id.*
4. Notices of objection to a voter for the city of Westminster were sent to the overseers, *by post*, enclosed in one envelope, addressed "to the overseers of the parish of St. Anne, in the city of Westminster," pursuant to the 101st section of the 6 & 7 Vict. c. 18, and were duly received and published by them:—Held, that this was a sufficient service; and that the objector was not bound to show that he had complied with all the requirements as to posting in s. 100. *Smith, app., Huggett, resp.,* 55
5. *Quare*, whether the provisions of s. 100 as to service of notices by post, apply to notices to overseers? *Id.*; and see *Smith, app., James, resp.,* 62
6. Notices of objection to a voter for the county of Middlesex were sent to the overseers, *by post*, enclosed in one envelope, addressed "to the overseers of the parish of Aston, in the county of Middlesex," pursuant to the 101st section of the 6 & 7 Vict. c. 18, and were duly received and published by them:—Held, that this was a sufficient service; and that the objector was not bound to show

that he had complied with all the requirements as to posting in s. 100. *Smith, app., James, resp.,* 62

7. *Stamped duplicate.*—In order to prove the transmission by the post of a notice of objection "signed by the objector," under the 6 & 7 Vict. c. 18, s. 100, it is sufficient to produce before the revising barrister the stamped duplicate returned by the postmaster to the person producing it, so signed. *Lewis, app., Roberts, resp.,* 23

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QUALIFICATION.

County Qualification.

1. *Parish Clerk.*—A. was in 1826 appointed parish clerk of St. J., Dover; and by license under the seal of the Archbishop of Canterbury, dated in 1832, he was confirmed in his office, "together with all and singular the fees, salaries, and profits either by law or ancient custom belonging to the same." Part of the emoluments attached to the office consisted of the clerk's share of an ancient due payable to the clerk and sexton upon the opening of every grave in the churchyard of

the parish; and this exceeded 40s. a year. The parish clerk had not himself to perform any of the work of or incident to the opening of the graves, this being done by the sexton. The revising barrister held that the ancient fee was in the nature of a remuneration for services rendered in conducting the funeral rites, and not a payment or emolument issuing out of or charged upon any land, and therefore that the parish clerk was not entitled to be registered:—Held, that his decision was right. *Buskell, app., Eastes, resp.*, 106

2. *Dissenting Minister.*—The minister of a congregation of "Particular Baptists" occupied copyhold premises (of sufficient value), which were vested in trustees, upon trust, among other things, "to permit and suffer the said dwelling-house and premises to be held, used, and occupied by the minister of the said congregation for the time being as and for his place of abode and residence." The deed contained no direction as to the mode of appointment of the minister, or any power for his removal. It appeared that the minister had, in the year 1847, upon the written invitation of the deacons, undertaken the ministry for a probationary period of three months; at the expiration of which period he, in accordance with a second (verbal) invitation in general terms, remained as minister of the congregation, and had ever since so continued, and occupied the premises as such. The evidence relied on to prove an appointment for life, consisted of his own statement that he so considered it, and the statement of one of the deacons (who had been a member of the congregation for thirty-five years), that the appointment was made in the usual way, and was, in his opinion, for life. The revising barrister having decided, that, assuming all the facts stated to be true, they did not amount to an appointment for life:—Held, that the question was strictly speaking one of fact, and that, although the revising barrister might have inferred that the appointment was for life, it was not a necessary inference, and therefore his decision must be affirmed. *Collier, app., King, resp.*, 14

3. *Preachers.*—One of the "six preachers" of the cathedral church of Canterbury claimed to be registered in respect of a "freehold office." The appointment was by the Archbishop of Canterbury, and the office held during good behaviour, provided the party remained in the diocese and preached at least twice a year in the cathedral. He received an annual stipend of 32l. from the dean and chapter of Canterbury, which was paid out of the chapter revenues, which were derived from lands in various places vested in the dean and chapter:—Held,—reversing the decision of the revising barrister,—that the claimant had no such freehold office or equi-

table interest arising out of land as to entitle him to be registered. *Hall, app., Lewis, resp.*, 114

4. *Lay Clerks and Bell-ringer.*—The like as to the lay clerks and the bell-ringer. *Id.*

5. *Shrewsbury Hospital.*—A hospital was founded at Sheffield, under the will of Gilbert Earl of Shrewsbury, for twenty "poor persons who should give themselves to the service of God and to pray for the prosperity of the noble family of the founder and his posterity." The persons eligible as members or inmates were to be "poor indigent people, well esteemed of for godly life and conversation, of good conditions, peaceable and quiet amongst their neighbours, and such as by persons of honest repute should be judged fit objects of the charity." Each poor person on his or her election was placed in rooms, with certain allowances. They were prohibited from letting or assigning, or permitting any person to occupy the rooms jointly with them; and they were to be removable by the governing body, if found guilty of certain irregularities:—Held,—upon the authority of *Heartley, app., Banks, resp.*, 5 C. B. N. S. 40 (E. C. L. R. vol. 94),—that the inmates had no such estate or interest in the rooms occupied by them as to entitle them to be registered as voters for the county. *Freeman, app., Gainsford, resp.*, 68

Borough Qualification, under 2 W. 4, c. 45, s. 27.

6. *Lay Clerk.*—The claimant, as one of the lay clerks of Windsor, occupied a house of more than 10l. a year value. It appeared that he was appointed a lay clerk by the dean and canons of Windsor, in whom was the freehold; that a certain number of houses are occupied by the lay clerks, but that, as there were more lay clerks than houses, the juniors on their appointment received 20l. additional salary until one became vacant; that then the salary was reduced by the 20l., and the clerk had the vacant house; that his residence therein was not necessary for the performance of his duties; but that he could not let the house without the consent of the dean and canons. There was no evidence of any statutes regulating the appointment of the lay clerks, though it was supposed that some existed; but the claimant stated that he believed he held his office for life, or so long as he did his duties:—Held, that the claimant was not entitled to be registered as a voter for the borough; either as owner or as tenant, under the 2 W. 4, c. 45, s. 27. *Bridgewater, app., Durant, resp.*, 7

7. *Part of a House.*—The occupation of "part of a house," without any actual severance from the residue, does not confer a right to vote for a city or borough, under the 2 W. 4, c. 45, s. 27,—non obstante the dictum in *Toms, app., Luckett, resp.*, 5 C. B. 23, 1

Lutw. Reg. Cas. 19. *Cook, app., Humber, resp.,* 33

8. C. occupied part of a house, consisting of two rooms on the ground-floor and other rooms above on one side of the house, the landlord (who resided on the premises) also occupying two rooms on the ground-floor and the rooms above on the other side of the house,—the rooms on the ground-floor rented by C. having doors into the house-passage or hall, which was shut off from the street by an outer door kept closed night and day; and the rooms on the upper floor rented by him being approached by a staircase used exclusively by him, and there being no communication between such rooms and the rooms on the other side of the passage. C. had a lock and key to each of his rooms, and both he and his landlord had keys of the street door; and they were rated jointly:—Held, that C. was not qualified to vote as tenant of a “house” within the 2 W. 4, c. 45, s. 27, the “subject of occupation” not being a house, but only a part of a house, without any actual severance from the residue. *Id.*

9. *Offices.*—The occupation of “offices,” without any actual severance from the residue of the premises, does not confer a right to vote for a city or borough, under the 2 W. 4, c. 45, s. 27. *Wilson, app., Roberts, resp.,* 50

10. R. occupied “offices” in the city of London, comprising the whole of the first floor of the house (his residence being within the required distance), and was rated and assessed, and had paid all rates and taxes in respect of the premises. The landlord occupied the shop on the ground-floor of the house, and with his family resided on the upper floor thereof. There were two outer

doors to the house,—one opening from the street into the shop, the other into a passage communicating with the staircase leading up to the first and upper floors. The door opening from the street into the passage had only one lock, of which R. and the landlord each had a key:—Held, that R. was not qualified to vote as tenant of a “house” within the 2 W. 4, c. 45, s. 27, the “subject of occupation” being a “part of a house,” which part had not become by actual severance an entire house in any sense of the word. *Id.*

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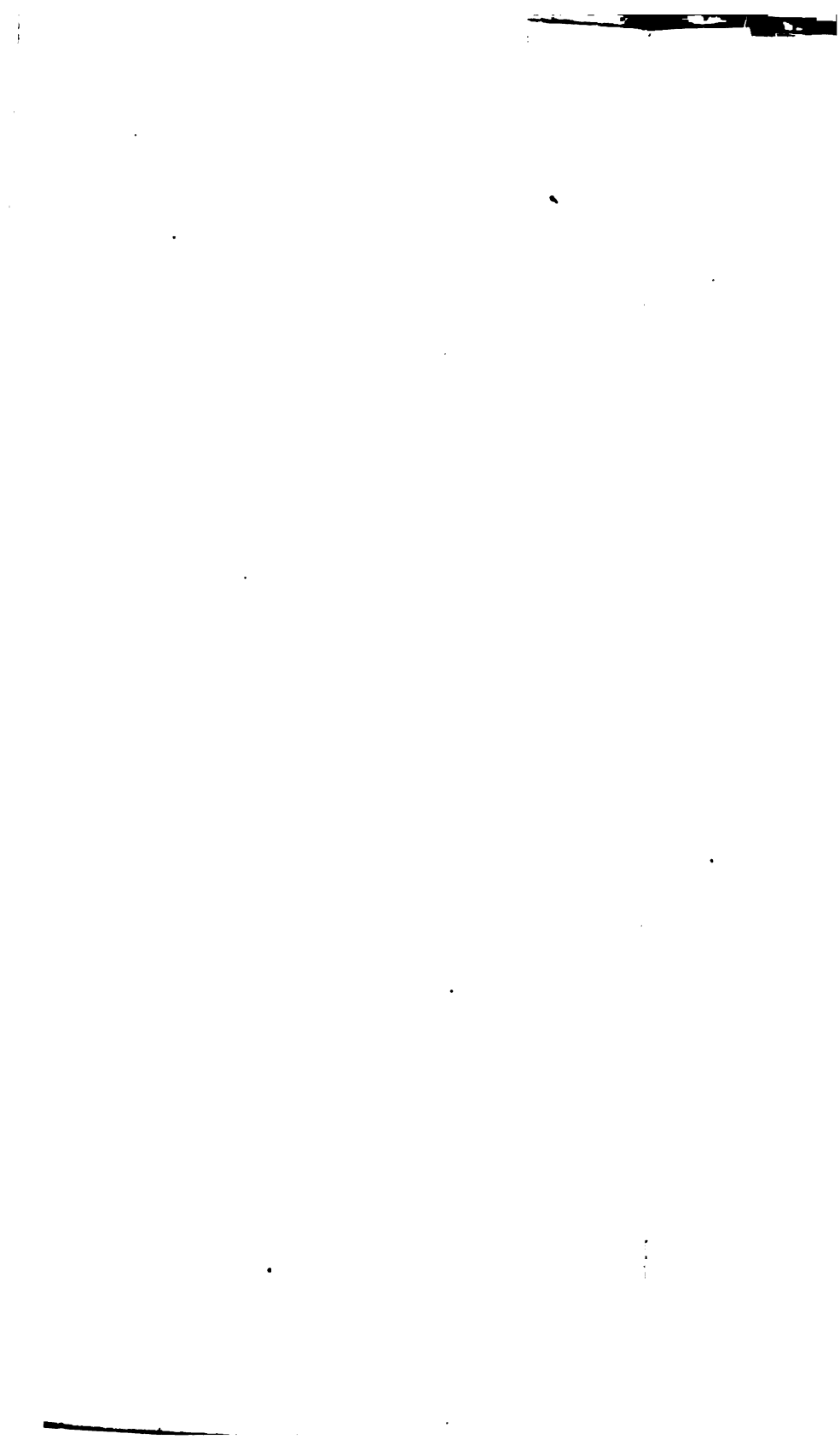
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